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Sup. Ct.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 65

ASHBACKER RADIO CORPORATION, PETITIONER,

vs.

FEDERAL COMMUNICATIONS COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED APRIL 24, 1945.

CERTIORARI GRANTED MAY 28, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1196

ASHBACKER RADIO CORPORATION, PETITIONER,

vs.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX.

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8871

ASHBACKER RADIO CORPORATION, Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee

Notice of Appeal from Decision and Order of the Federal Communications Commission and Statement of Reasons Therefor—Filed September 30, 1944

I

NOTICE OF APPEAL

Ashbacker Radio Corporation, a Michigan corporation, gives Notice of Appeal under Section 402(b) (2) of the Communications Act of 1934 from a decision and order of the Federal Communications Commission adopted June 27, 1944 (Appellant's Petition for Rehearing denied September 12, 1944) granting an application of John E. Fetzer and Rhea Y. Fetzer, co-partners d/b as Fetzer Broadcasting Company for construction permit for a new broadcast station to operate at 1230 kilocycles, 250 watts, unlimited time, at Grand Rapids, Michigan.

[fol. 2] II

STATEMENT OF APPELLANT'S INTEREST

1. Appellant is the licensee of WKBZ, a broadcasting station operating at 1490 kilocycles with power of 250 watts, unlimited time, at Muskegon, Michigan.

2. On April 29, 1944 appellant filed with the Federal Communications Commission an application dated April 27, 1944 requesting a change in frequency for WKBZ from 1490 kilocycles to 1230 kilocycles to which application the Commission assigned the file designation B2-P-3609.

3. There was pending before the Commission at the time the WKBZ application was filed an application designated B2-P-3590, filed March 20, 1944 by John E. Fetzer and Rhea Y. Fetzer, d/b as Fetzer Broadcasting Company for a new station to operate at 1230 kilocycles, 250 watts, unlimited time, at Grand Rapids, Michigan.

4. On June 28, 1944 the Commission announced that on the previous day, without notice to appellant and without affording appellant any opportunity to be heard, upon a mere examination of the two applications, it had granted Fetzer Broadcasting Company a construction permit for a new station to use 1230 kilocycles, at Grand Rapids (Commissioner Case dissenting), and had designated for hearing appellant's application for the use of 1230 kilocycles at Muskegon.

5. Since Muskegon and Grand Rapids are only 50 miles apart, the Commission could not grant both the applications of appellant and of Fetzer Broadcasting Company. These applications were and are mutually exclusive and a grant of either requires a denial of the other.

[fol. 3] 6. On July 17, 1944 appellant filed with the Commission a timely "Petition for Hearing, Rehearing or Other Relief" in which, among other things, it was asserted that the Commission's action in granting the Fetzer application was contrary to the requirements of Section 307(b) of the Communications Act and violative of Section 3.35 of its own Rules and Regulations dealing with multiple station ownership in that Fetzer Broadcasting Company owns and operates a station, WKZO at Kalamazoo, which serves Grand Rapids. This Petition was denied by the Commission on September 12, 1944.

7. On August 1, 1944, while appellant's petition of July 17, 1944 was pending before it and undecided, the Commission addressed to appellant a "Notice of Hearing." This "Notice of Hearing" purports to afford appellant a hearing upon its own application (but not upon the Fetzer Broadcasting Company application) for 1230 kilocycles. It states:

> "The application involved herein (meaning appellant's application) will not be granted by the Commission unless the issues listed above are determined in favor of the applicant on the basis of a record duly and properly made by means of a formal hearing."

Issue #3 of said Notice asserts that one of the purposes of the hearing is:

> "To determine the extent of any interference which would result from the simultaneous operation of station WKBZ as proposed, and station * * * WJEF"

meaning, by the call letters WJEF, the station authorized on June 27, 1944 to be constructed by Fetzer Broadcasting Company to operate at 1230 kilocycles at Grand Rapids.

This "Hearing" is scheduled to take place on October 3, 1944.

[fol. 4]

III

Specifications of Error

The action of the Commission taken on June 27, 1944 and affirmed on September 12, 1944 is without warrant in law, is contrary to law, and is arbitrary, capricious and oppressive in the following respects:

1. It denies to appellant the full and fair hearing to which appellant is entitled under the Communications Act and attempts to substitute therefor a futile proceeding in which all substantive issues have been predetermined without hearing adversely to appellant.

2. It violates the due process clause of the Fifth Amendment of the Constitution of the United States.

3. It contravenes Section 307(b) of the Communications Act of 1934 under which the Commission is required "to make and maintain a fair, efficient and equitable distribution of radio service," among the several states and communities.

4. It contravenes Section 3.24 of the Commission's Regulations which implement Section 307(b) of the Communications Act.

5. It contravenes Section 3.35 of the Commission's Regulations with respect to multiple ownership of broadcasting stations.

Relief Requested

Wherefore, appellant prays an Order of this Court:

A. Reversing and setting aside the Order of the Federal Communications Commission hereinabove described taken on June 27, 1944;

[fol. 5] B. Remanding the case to the said Commission for proceedings consistent with law; and,

C. For such other and further relief as may be just and proper.

Respectfully submitted, Ashbacker Radio Corporation, by Philip J. Hennessey, Jr., George S. Smith, Harold G. Cowgill; Segal, Smith & Hennessey, 1026 Woodward Building, Washington 5, D. C. Attorneys for Appellant.

September 30, 1944.

Proof of Service

Receipt is acknowledged this — day of September 1944 of a true copy of the foregoing Notice of Appeal.

Federal Communications Commission, by J. J. Slowie.

[fol. 6] [File endorsement omitted]

In the United States Court of Appeals for the District of Columbia

[Title omitted]

Motion for Stay Order—Filed September 30, 1944

1. Ashbacker Radio Corporation has this day noted its appeal from a decision of the Federal Communications Commission dated June 27, 1944 (Rehearing denied September 12, 1944) granting an application of John E. Fetzer and Rhea Y. Fetzer, d/b as Fetzer Broadcasting Company, for a new broadcast station to operate at 1230 kilocycles, 250 watts, unlimited time at Grand Rapids, Michigan. Reference is made to said "Notice of Appeal and Statement of Reasons Therefor" for greater certainty.

2. The action complained of was taken without notice to appellant or any opportunity to be heard notwithstanding that appellant had pending before the Commission a mutually exclusive application for the use of 1230 kilocycles at Muskegon, Michigan.

3. On July 17, 1944 appellant filed with the Commission a "Petition for Hearing, Rehearing and Other Relief" asserting all the errors upon which appellant relies in this Court. This Petition was denied on September 12, 1944.

[fol. 7] 4. The Commission's action of June 27, 1944 consisted merely of a minute entry that the Fetzer application had been granted and was not accompanied by any opinion or statement of reasons for the action. In denying appellant's Petition of July 17, 1944, however, the Commission issued a written Decision and Order, a copy of which, dated September 12, 1944, is attached hereto as Exhibit A.

5. The scope of the questions of law and fact raised by the applications may be gauged from Exhibit A and more particularly from the findings of fact set forth on pages 3 and 4 thereof, all of which have been made without affording appellant an opportunity to be heard. Appellant denies that said findings are either accurate or adequate to sustain the Commission's action.

6. On August 1, 1944, while appellant's Petition of July 17, 1944 was pending before it, the Commission issued to appellant a purported "Notice of Hearing" which, upon its face, affirms the Commission's intention not to afford the full, fair, comparative and competitive hearing to which appellant is entitled. Instead of affording both applicants a proper opportunity to present their respective claims for the use of 1230 kilocycles as an unused frequency in central Michigan, said Notice imposes upon appellant the burden of applying for a frequency which Fetzer Broadcasting Company will be using under the call letters WJEF as soon as construction can be completed. Fetzer Broadcasting Company now has pending before the Commission a petition to participate in this "Hearing" not as an applicant on equal footing with appellant but as an intervenor in defense of an assignment already granted.

[fol. 8] 7. This hollow and entirely meaningless hearing is scheduled for October 3, 1944. Unless stayed by action of

this Court, Fetzer Broadcasting Company will have completed the construction of its station at Grand Rapids before any Commission decision upon appellant's application and thereupon will be entitled, not as a matter of Commission discretion but as a matter of right, to a license under Section 319(b) of the Communications Act. Appellant has pending a motion for postponement of the hearing now scheduled for October 3, 1944 upon which motion no action has yet been taken.

8. In its Petition of July 17, 1944 appellant requested the Commission to stay the issuance of any construction permit to Fetzer Broadcasting Company until this Court should have had an opportunity to take action on this appeal. The Commission has denied appellant any administrative stay (Exhibit A, p. 5).

9. There is no plain, adequate or speedy remedy to prevent irreparable injury to appellant other than the issuance of a stay by this Court. Even a final decision in favor of appellant by this Court could not restore the parties to the positions they occupied on June 27, 1944 if appellant is required to participate in the hearing scheduled for October 3, 1944 and Fetzer Broadcasting Company constructs the station which the Commission has authorized at Grand Rapids.

10. There is no plain, adequate or speedy remedy to prevent irreparable injury to the public other than the issuance of an order of stay by this Court. An adequate record of the needs of Muskegon and Grand Rapids for additional radio service can be made only by affording appellant and Fetzer Broadcasting Company a full and fair opportunity in a proper hearing to demonstrate which application would better serve public interest, convenience and necessity.

[fols. 9-19] 11. No injury either to Fetzer Broadcasting Company or to the public can result from the granting of the stay order requested herein. There will be no diminution in the service presently available to Grand Rapids from the two stations now located there. Fetzer Broadcasting Company will be in no wise prejudiced should the Commission, on a proper record, ultimately grant its application.

12. Appellant's position is supported by the decision of this Court in *Colonial Broadcasters, Inc.* v. *Federal Com-*

munications Commission, 70 App. D. C. 258, 105 F. (2d) 781. In that case the appellant did not file his application until after the Commission had designated an earlier application for hearing. The Ashbacker and Fetzer applications were presented to the Commission for action on the same day. Had the Commission followed the rule approved by this Court in *Colonial Broadcasters, Inc.* v. *Federal Communications Commission*, it would have designated both applications for a consolidated hearing. Compare *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

13. This Court's authority to issue stay orders in appeals under Section 402(b) (2) to prevent a change in status through mere lapse of time is unquestioned. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4.

Wherefore, appellant respectfully prays that this Court issue its order to the Commission suspending the effectiveness of the Commission's actions of June 27, 1944 and September 12, 1944 granting to Fetzer Broadcasting Company the authority complained of pending the determination of the present appeal.

Respectfully submitted, Ashbacker Radio Corporation, by Philip J. Hennessey, Jr., George S. Smith, Harold G. Cowgill. Segal, Smith & Hennessey, 1026 Woodward Building, Washington 5, D. C., Attorneys for Appellant.

September 30, 1944.

[fol. 20] PROOF OF SERVICE

Receipt is acknowledged this 30th day of September, 1944 of a true copy of the foregoing Motion for Stay Order.

Federal Communications Commission, by ——,
John E. Fetzer and Rhea Y. Fetzer, d/b as Fetzer Broadcasting Company, by ——.

[fol. 21] EXHIBIT "A" TO MOTION

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Corrected Copy

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON 25, D. C.

File No. B2-P-3590

In re Application of JOHN E. FETZER AND RHEA Y. FETZER d/b as FETZER BROADCASTING COMPANY, Grand Rapids, Michigan

For Construction Permit

Decision and Order on Petition for Hearing, Rehearing and Other Relief

By the Commission (Case, Commissioner, dissenting; Fly, Chairman and Wakefield, Commissioner, not participating):

The Commission has before it a petition filed (July 17, 1944) by Ashbacker Radio Corporation (WKBZ), Muskegon, Michigan, for hearing, rehearing or other relief, which is directed against the action of the Commission June 27, 1944 granting the application filed (March 20, 1944) by John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, Grand Rapids, Michigan, for construction permit (B2-P-3590) to erect a new standard broadcast station at that place to operate on the frequency 1230 kc with 250 watts power, unlimited time.

Petitioner's station, WKBZ, is licensed to operate on the frequency 1490 kc with 250 watts power, unlimited time. On May 5, 1944, petitioner filed an application for construction permit (B2-P-3609) requesting a change in frequency from 1490 kc to 1230 kc.

The simultaneous use of 1230 kc at Grand Rapids and Muskegon, Michigan would result in intolerable interference to both applicants, and therefore these applications are actually exclusive. The Commission on June 27, 1944, upon comparative examination of the two applications, found that a grant of the Fetzer application (B2-P-3590) would serve public interest, convenience and necessity, and accordingly, granted the same pursuant to Section 309(a)

of the Communications Act of 1934. Since a grant of the Fetzer application precluded a grant without hearing of the Ashbacker application (B2-P-3609), the Commission on the same day designated the latter application for hearing in accordance with Section 309(a) of the Act.

The petition alleges that "WKBZ is the only station rendering a primary service to Muskegon County, population 107,852"; that upon its presently assigned frequency of 1490 kc, "and under the high attenuation conditions which prevail in that area", WKBZ is unable to render satisfactory service during day time to those sections of the County more than 15.5 miles distant from its transmitter; that at night, WKBZ, is unable to render a satisfactory service to portions of greater Muskegon or to communities such as Fruitport and Laketon "which are normally tributary to Muskegon"; that the purpose of its application to change frequency "was to extend WKBZ's service to lis- [fol. 22] teners who do not now receive primary service from any station"; that the City of Grand Rapids and portions of Kent County (where the new Fetzer station is to be located) now received primary service from Stations WOOD (5 kw-1300 kc—unlimited time) and WLAV (250 watts-1340 kc—unlimited time), both in Grand Rapids; and that a third station at Grand Rapids operating with 250 watts, unlimited time on 1230 kc will simply provide "a third service for listeners already well served by these two existing stations".

The petition further alleges that Station WKZO at Kalamazoo, Michigan "with 5000 watts power, unlimited time on 590 kc renders primary service to Grand Rapids, advertises that its coverage to Grand Rapids is satisfactory and maintains studios at Grand Rapids". Upon information and belief, it is alleged that WKZO is owned and operated by Fetzer Broadcasting Company, a Michigan corporation, which is controlled by John E. Fetzer and Rhea Y. Fetzer, the applicant in B2-P-3590.

Based upon the foregoing allegations, petitioner contends that the grant of the Fetzer application and the designation of petitioner's application for hearing:

1. Contravenes Section 307(b) of the Communications Act of 1934 and Section 3.24 of the Rules and Regulations of the Commission in that "it provides an additional radio broadcasting service to a community already well served at the expense of the listeners in the

vicinity of Muskegon who do not now have a single primary service";

2. Results in common ownership of two stations "each of which renders primary service to a substantial portion of the primary service of the other contrary to Section 3.35 of the Commission's Rules";

3. Denies to petitioners "the fair hearing to which every applicant is entitled under Section 309(a) of the Communications Act and attempts to substitute therefore a 'hearing' after all the issues between Ashbacker and Fetzer have been resolved in favor of Fetzer"; and

4. "Violates the due process clause of the Fifth Amendment to the Constitution of the United States".

Petitioner prays that the Commission reconsider and set aside its action granting the Fetzer application, designate both applications for a public hearing or, in the alternative, stay the issuance of the construction permit for the use of 1230 kc to Grand Rapids until action is taken upon this petition and until petitioner has had an opportunity to file its notice of appeal with the Court of Appeals pursuant to Section 402(b) (2) of the Communications Act of 1934.

On July 22, 1944, the opposition of Fetzer Broadcasting Company to the Ashbacker petition was filed.

[fol. 23] A comparison of important facts relating to the two applications indicates the following:

A. United States Census Figures (1940)

Muskegon, Michigan: Population, 47,697. (Not a metropolitan center.)

Grand Rapids, Michigan: Population, 164,292. (Grand Rapids metropolitan district: population, 209,873.)

B. Service Proposed by Each

Ashbacker, Muskegon, Mich.: Proposed nighttime service, 81,629. Present nighttime service, 77,657. Proposed gain in service, 3,972 (about 5%). Proposed daytime service, 107,340. Present daytime service, 97,525. Proposed gain in service, 9,815 (about 10%).

Fetzer, Grand Rapids, Michigan: Proposed (new) nighttime service, 202,800. Proposed (new) daytime service, 238,800.

C. Interference to Existing Stations from the Operation of Each Station as Proposed

Ashbacker, Muskegon, Michigan: Involves objectionable interference to about 5% of the primary daytime service area of Station WHBY, Appleton, Wisconsin.

Fetzer, Grand Rapids, Michigan: Does not involve objectionable interference to any existing station.

D. Primary Service Now Received by Each Area Day and Night

Muskegon, Michigan: Daytime: WGN and WMAQ, Chicago, Ill.; WOOD, Grand Rapids, and WKZO, Kalamazoo, Mich.; WTNJ, Milwaukee, Wisconsin. Nighttime: WGN and WMAQ, Chicago, Ill.

Grand Rapids, Michigan: Daytime: WOOD and WLAV, Grand Rapids, Mich.; WJR, Detroit, Mich.; WGN and WMAQ, Chicago, Ill.; WKZO, Kalamazoo, Mich. Nighttime: WOOD and WLAV, Grand Rapids, Mich.; WJR, Detroit, Mich.; WGN and WMAQ, Chicago, Ill.

[fol. 24] From the foregoing, it is manifest that the Fetzer grant does not, as petitioner contends, contravene Section 307(b) of the Communications Act of 1934 and Section 3.24 of the Rules and Regulations of the Commission in so far as these require the Commission to provide a fair, efficient and equitable distribution of radio service among the several states and communities, since the change in frequency requested by petitioner would if granted, result in a slight increase in service to an area and population which already receives primary service day and night from several stations, and this slight increase in service to the Muskegon area would be offset by the objectionable interference to Station WHBY at Appleton, Wisconsin, by about the same proportion as the increase in nighttime service to the Muskegon station as a result of its operation as proposed; whereas the Fetzer grant will result in the establishment of a new service to a very substantial population which can be instituted without resulting in objectionable interference to any existing service.

Petitioner also contends that it was error for the Commission to grant the Fetzer application because it results in "common ownership of two stations, each of which renders

primary service to a substantial portion of the primary service area of the other, contrary to Section 3.35[1] of the Commission's Regulations". This contention is without merit. Although it is true that Station WKZO, Kalamazoo, Michigan, is owned by a Michigan corporation whose controlling stockholders are the applicants for the Grand Rapids station, it is not true that the proposed Grand Rapids station and Station WKZO, Kalamazoo, each "renders service to a substantial portion of the primary service area of the other". In its Public Notice of April 4, 1944, the Commission announced that in determining whether there was such an overlapping in a particular case, it would give consideration to "location of centers of population and distribution of population, location of main studios, areas and populations to which services of stations are directed as indicated by commercial business of stations, news broadcasts, sources of programs and talent, coverage claims and listening audience." The proposed Grand Rapids station, operating on 1230 kc with 250 watts power, approximately 50 miles distant from Kalamazoo, will not render primary service, day or night, to any part of the city of Kalamazoo, Michigan and environs. Because of objectionable interference which the Kalamazoo station receives at night from an existing station, WKZO will not render primary service at night to any portion of the primary service area of the Grand Rapids station, and in the daytime, because of the high noise level in Grand Rapids, WKZO does not render primary service to the business district of Grand Rapids. Moreover, Grand Rapids, which is the second largest business market in Michigan, is a separate and distinct community in a separate and distinct trade area from Kalamazoo, Michigan. In view of these facts,

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[1] Section 3.35 of the Commission's Rules and Regulations provides that: "No license shall be granted for a standard broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substantial portion of the primary service area of another standard broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation."

we hold that a grant of the Fetzer application would be consistent with the provisions of Section 3.35 of our Rules and Regulations.

[fol. 25] Finally, petitioner alleges that the grant of the Fetzer application denies to it a fair hearing to which it is entitled under Section 309(a) of the Communications Act and that it violates the due process clause of the 5th Amendment to the Constitution of the United States. These allegations are entirely without merit. The Commission has not denied petitioner's application. It has designated the application for hearing as required by Section 309(a) of the Act. At this hearing, petitioner will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944. Such grant does not preclude the Commission, at a later date from taking any action which it may find will serve the public interest. In re: *Berks Broadcasting Company (WEEU)*, Reading, Pennsylvania, 8 FCC 427 (1941); In re: *The Evening News Association (WWJ)*, Detroit, Michigan, 8 FCC 552 (1941); In re: *Merced Broadcasting Company (KYOS)*, Merced, California, 9 FCC 118, 120 (1942).

From a careful review of the Ashbacker petition, the applications of Ashbacker Radio Corporation (B2-P-3609) and John E. and Rhea Y. Fetzer (B2-P-3590), and the opposition filed by Fetzer Broadcasting Company to the Ashbacker petition, the Commission finds that no valid reason has been disclosed for setting aside the June 27, 1944 grant to the Fetzer Broadcasting Company. Moreover, no reason appears in the petition why the Fetzer grant, which the Commission has found would be in the public interest, should be stayed pending the filing by the petitioner of a Notice of Appeal in the United States Court of Appeals for the District of Columbia.

Accordingly, It Is Ordered, This 12th day of September, 1944, that the petition of Ashbacker Radio Corporation for hearing, rehearing, or other relief, directed against the action of the Commission June 27, 1944, granting the application of John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, Grand Rapids, Michigan, for construction permit (B2-P-3590), Be, And It Is Hereby, Denied.

It Is Further Ordered, That the request in said petition for stay of the issuance of any construction permit for the

use of 1230 kilocycles at Grand Rapids, Michigan, Be, And It is Hereby Denied.

Federal Communications Commission, T. J. Slowie, Secretary.

[fol. 26] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

OPPOSITION TO MOTION FOR STAY ORDER—Filed October 6, 1944

On March 20, 1944, John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, Grand Rapids, Michigan, filed an application for construction permit to erect a new standard broadcast station at Grand Rapids, Michigan, to operate on the frequency 1230 kc, with 250 watts power, unlimited time. On May 5, 1944, appellant, which is now licensed to operate Station WKBZ, Muskegon, Michigan, on the frequency 1490 kc, with 250 watts, unlimited time, filed an application for a construction permit requesting a change in frequency for WKBZ from 1490 kc to 1230 kc. As the simultaneous use of 1230 kc at Grand Rapids and Muskegon, Michigan, would result in intolerable interference to both applicants, these two applications are mutually exclusive.

The Commission, on June 27, 1944, upon a comparative examination of the two applications found that a grant of the Fetzer application would serve the public interest, convenience, and necessity, and granted that application pursuant to Section 309 (a) of the Communications Act of 1934. On the same day the Commission designated appellant's application for hearing, pursuant to Section 309(a) of the Communications Act. The hearing was scheduled for October 3, 1944, but on motion of appellant the hearing has been continued until December 5, 1944.

On July 17, 1944, appellant filed with the Commission a petition for hearing, rehearing, or other relief directed against the action of the Commission granting the Fetzer application, and requesting a stay of the Fetzer grant.

Upon careful review of the petition, which presented the same issues as are involved in the appeal to this Court, the Commission on September 12, 1944 entered an opinion and order denying appellant's petition. In its opinion, which [fol. 27] is "Exhibit A" attached to appellant's motion in this Court for a stay order, the Commission found that the grant of appellant's application would result in an increase of about 3,972 night time listeners—an increase of about 5%—and an increase of about 9,815 daytime listeners —an increase of about 10%—in an area which already receives primary service from five other stations during the day and two other stations at night. Moreover, even this slight increase in service would be at the cost of objectionable interference to station WHBY, Appleton, Wisconsin. On the other hand, it was found that a grant of the Fetzer application would result in the establishment of a new service to a very substantial population estimated at 202,800 for night time service and 238,800 for daytime service, without resulting in objectionable intereference to any existing station.

The Commission further found in its opinion that there was no substance in appellant's contention that a grant of the Fetzer application results in "common ownership of two stations, each of which renders primary service to a substantial portion of the primary service area of the other," contrary to Section 3.35[1] of the Commission's Rules and Regulations. Appellant contended that the Commission's rule was violated because the controlling stockholders in the Fetzer Corporation also control the corporation which owns station WKZO, Kalamazoo, Michigan. The opinion, however, pointed out that the proposed Grand Rapids station operating on 1230 kc, with 250 watts

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[1] Section 3.35 of the Commission's Rules and Regulations provides that: "No license shall be granted for a standard broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substantial portion of the primary service area of another standard broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation."

power, approximately 50 miles distant from Kalamazoo, will not render primary service day or night to any part of the City of Kalamazoo, Michigan and its environs. Also, the Kalamazoo station will not render primary service at night to any portion of the primary service area of the Grand Rapids station, and in the daytime does not render primary service to the important business district of Grand Rapids because of the high noise level in Grand Rapids. Moreover, as the opinion states, Grand Rapids is the second largest business market in Michigan and is a separate [fol. 28] and distinct community in a separate and distinct trade area from Kalamazoo, Michigan. In view of these facts the Commission concluded that a grant of the Fetzer application would not be inconsistent with the provisions of Section 3.35 of the Commission's Rules and Regulations.

Appellant also argued before the Commission that a grant of the Fetzer application resulted in a denial to appellant of a fair hearing to which it is entitled under Section 309(a) of the Communications Act and violates the due process clause of the Fifth Amendment of the Constitution. The Commission's opinion expressly points out, however, that appellant's application has not been denied but has been designated "for hearing as required by Section 309(a) of the Act", and that at this hearing appellant "will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944. Such grant does not preclude the Commission, at a later date, from taking any action which it may find will serve the public interest."

It was for the foregoing reasons that the Commission denied appellant's petition for hearing, rehearing, or other relief. Upon the denial of this petition appellant filed in this Court its notice of appeal and motion for stay order.

Appellant has completely failed to justify the issuance of a stay order. In the first place, as will be discussed in greater length in a motion to dismiss the appeal which the Commission intends to file, appellant does not have standing to maintain this appeal. As has been pointed out above, appellant's application has not been denied, but has been designated for hearing in accordance with Section 309(a) of the Communications Act. At that hearing appellant will have ample opportunity to show that a grant

of its application rather than the Fetzer application would better serve the public interest. If appellant demonstrates at that hearing that a grant of its application rather than the Fetzer application will better serve the public interest, the Commission will be required to grant appellant's application even though such action would necessitate modification or revocation of the construction permit granted the Fetzer Company. Accordingly, appellant's opportunity to press its application to the fullest has in no way been impaired by a grant of the competing Fetzer application. [fol. 29] This Court has held that an applicant has no standing to appeal under § 402(b)(2) of the Communications Act where his application has been designated for hearing after mutually exclusive application has been granted without hearing. *Palmer v. Federal Communications Commission*, App. D. C. No. 7542, Feb. 16, 1940; *Frequency Broadcasting Corp. v. Federal Communications Commission*, App. D. C. No. 8055, April 26, 1942.

In the second place, appellant has utterly failed to show that a grant of the Fetzer application has caused or will cause it any irreparable injury. As a matter of fact its motion for stay order does not even allege that there will be any such irreparable injury, and it is difficult to perceive how such a contention could be supported. The grant of a construction permit merely authorizes construction of the physical facilities of a station. Operation of the station may be conducted only pursuant to a station license. Moreover, as has already been indicated, despite any station construction engaged in by the Fetzer company pursuant to its construction permit, that permit remains subject to future modification or revocation by the Commission, if required in the public interest, and remains subject to the outcome of any appeal from Commission action in that case that appellant may take. It is difficult to see how appellant can possibly be injured by the issuance of a construction permit which merely authorizes the Fetzer Broadcasting Company to construct a station.

It is, therefore, submitted that appellant's motion for stay order should be denied.

Federal Communications Commission, Charles R. Denny, General Counsel; Harry M. Plotkin, Assistant General Counsel; Joseph M. Kittner, Counsel.

Acknowledgment of Service

Service of the foregoing Opposition to Motion for Stay Order is hereby acknowledged and a true copy thereof received this 6th day of October, 1944.

Philip J. Hennessey, Jr., Counsel for Appellant.

[fol. 30] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

APPELLEE'S MOTION TO DISMISS THE APPEAL—Filed October 28, 1944

The Federal Communications Commission, appellee in the above-entitled cause, moves the Court to dismiss the appeal purportedly taken under Section 402(b) of the Communications Act of 1934, as amended, for the reason that the Court has no jurisdiction under Section 402(b) to entertain this appeal.

Respectfully submitted, Federal Communications Commission. Signed: Charles R. Denny, General Counsel. Harry M. Plotkin, Assistant General Counsel.

[fol. 31] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

BRIEF IN SUPPORT OF MOTION TO DISMISS THE APPEAL

Statement of Facts

On March 20, 1944, John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, Grand Rapids, Michigan, filed an application for construction permit to erect a new standard broadcast station at Grand Rapids, Michigan, to operate on the frequency 1230 kilocycles, with 250 watts power, unlimited time. On May 5,

1944, appellant, which is now licensed to operate Station WKBZ, Muskegon, Michigan, on the frequency 1490 kilocycles with 250 watts power, unlimited time, filed an application for a construction permit requesting a change in frequency for WKBZ from 1490 kilocycles to 1230 kilocycles. As the simultaneous use of 1230 kilocycles at Grand Rapids and Muskegon, Michigan, would result in intolerable interference to both applicants, these two applications were mutually exclusive.

The Commission, on June 27, 1944, upon a comparative examination of the two applications, found that a grant of the Fetzer application would serve public interest, convenience, or necessity, and granted that application. On the same day, pursuant to Section 309(a) of the Communications Act, the Commission designated appellant's application for hearing for October 3, 1944.[1]

On July 17, 1944, appellant filed with the Commission a petition for hearing, rehearing, or other relief directed against the action of the Commission granting the Fetzer application, and requesting a stay of the Fetzer grant. Upon careful review of the petition, which presented the same issues as are involved in the appeal to this Court, the Commission on September 12, 1944, entered an opinion [fol. 32] and order denying appellant's petition. In its opinion, which is "Exhibit A" attached to appellant's motion in this Court for a stay order, the Commission found that a grant of appellant's application would result in an increase of about 3,972 night time listeners—an increase of about 5%—and an increase of about 9,815 daytime listeners —an increase of about 10%—in an area which already receives primary service from five other stations during the day and two other stations at night. Moreover, even this slight increase in service would be at the cost of objectionable interference to Station WHBY, Appleton, Wisconsin. On the other hand, it was found that a grant of the Fetzer application would result in the establishment of a new service to a very substantial population estimated at 202,800 for night time service and 238,800 for daytime service, without resulting in objectionable interference to any existing station.

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[1] On motion of appellant the hearing has been postponed until December 5, 1944.

The Commission further found in its opinion that there was no substance in appellant's contention that a grant of the Fetzer application would result in "common ownership of two stations, each of which renders primary service to a substantial portion of the primary service area of the other," contrary to Section 3.35[2] of the Commission's Rules and Regulations. Appellant contended that the Commission's rule was violated because the controlling stockholders in the Fetzer Corporation also control the corporation which owns Station WKZO, Kalamazoo, Michigan. The opinion, however, pointed out that the proposed Grand Rapids station operating on 1230 kilocycles, with 250 watts power, approximately 50 miles distant from Kalamazoo, will not render primary service day or night to any part of the City of Kalamazoo, Michigan, and its environs. The opinion further pointed out that the Kalamazoo station will not render primary service at night to any portion of the primary service area of the Grand Rapids station, and in the daytime does not render primary service to the important business district of Grand Rapids because of the high noise [fol. 33] level in Grand Rapids. Moreover, as the opinion states, Grand Rapids is the second largest business market in Michigan and is a separate and distinct community in a separate and distinct trade area from Kalamazoo, Michigan. In view of these facts the Commission concluded that a grant of the Fetzer application would not be inconsistent with the provisions of Section 3.35 of the Commission's Rules and Regulations.

Appellant also argued before the Commission that a grant of the Fetzer application resulted in a denial to appellant of a fair hearing to which it is entitled under Section 309(a) of the Communications Act and violates the due process

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[2] Section 3.35 of the Commission's Rules and Regulations provides that: "No license shall be granted for a standard broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substantial portion of the primary service area of another standard broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation."

clause of the Fifth Amendment of the Constitution. The Commission's opinion expressly points out, however, that appellant's application has not been denied but has been designated "for hearing as required by Section 309(a) of the Act," and that at this hearing appellant "will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944. Such grant does not preclude the Commission, at a later date, from taking any action which it may find will serve the public interest."

It was for the foregoing reasons that the Commission denied appellant's petition for hearing, rehearing, or other relief. Upon the denial of this petition appellant filed in this Court its notice of appeal.

Argument

It is clear from a consideration of the provisions of the Communications Act prescribing the procedure to be followed by the Commission in passing upon applications for construction permits and licenses[3] that the action of the Commission in granting the Fetzer application and designating appellant's application for hearing does not aggrieve or adversely affect appellant's interest within the meaning of Section 402(b)(2) of the Communications Act and that hence appellant has no standing to maintain the appeal. Section 309(a) provides that the Commission shall grant [fol. 34] an application if upon examination thereof it can determine that public interest, convenience, or necessity will be served by the grant; otherwise, the Commission must designate the application for hearing. That is precisely what the Commission has done in this case. Since the Commission was able to determine from an examination of the Fetzer application that public interest would be

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[3] Section 319 relating to applications for construction permits does not prescribe what procedure the Commission shall follow in passing upon applications; but the Commission uniformly follows the same procedure as to such applications as that prescribed in Section 309(a) relating to applications for licenses, renewals and modifications of licenses. See *Goss* v. *Federal Radio Commission*, 62 App. D. C. 301, 67 F. (2d) 507.

served by a grant of the application, it granted the application. Being unable to reach the same determination with respect to appellant's application, the Commission designated it for hearing. This does not mean that appellant's application has been denied. It has been designated for hearing, and the result of such hearing cannot be foretold. It would be unwarranted to assume as a basis for decision that the Commission will deny appellant's application after hearing because of the grant to Fetzer. See *Black River Valley Broadcast, Inc.* v. *McNinch*, 69 App. D. C. 311, 101 (2d) 235. If appellant can demonstrate at the hearing that public interest, convenience, or necessity will be better served by its proposed operation rather than that proposed in the Fetzer application the Commission must approve appellant's application; even though such approval necessitates the modification of the construction permit held by Fetzer [4] or the modification [4] of or refusal to renew [5] a license held by Fetzer. To be sure, as long as appellant and Fetzer desire conflicting facilities, the question whether the grant of either or both applications will serve the public interest rests on a comparison between the two proposals; but the grant to Fetzer does not alter the necessity for such comparison or affect the showing which appellant must make at the hearing on its application.

From the foregoing it is clear that appellant's opportunity to press its application to the fullest has in no way been impaired by a grant of the competing Fetzer application. Accordingly, appellant cannot assert that the grant to Fetzer has in any way prejudiced its position with reference to its own application. This being so, it is difficult to see what possible ground appellant can assert as the basis of its standing to maintain this appeal.

[fol. 35] The decisions of this court in *Palmer* v. *Federal Communications Commission*, App. D. C. No. 7542, February 16, 1940, unreported, and *Frequency Broadcasting*

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[4] Section 312(b) provides that any outstanding license or construction permit may be modified if in the judgment of the Commission such action will promote the public interest, convenience, or necessity.

[5] Section 307(d) provides that renewals shall be governed by the same considerations as applications for new stations.

Corp. v. *Federal Communications Commission*, App. D. C. No. 8055, April 26, 1942, unreported, clearly hold that an applicant for a construction permit has no right which can be aggrieved by the grant of a mutually exclusive application. In the first of these cases, Palmer applied for a construction permit for a new station in Hot Springs, Arkansas. Wilson and Shuman had previously applied for the facilities requested by Palmer. The Commission granted the application of Wilson and Shuman and designated Palmer's for hearing. Palmer thereupon appealed to this Court as a person aggrieved or whose interests were adversely affected by the grant to Wilson and Shuman. The Commission moved to dismiss the appeal on the ground that Palmer was not aggrieved since the Commission was still obliged to hear Palmer's application and grant him a permit if public interest, convenience, or necessity would be served thereby, even if that would necessitate denial of a renewal of Wilson and Shuman's license. The Court granted the Commission's motion and dismissed the appeal without opinion, thereby upholding the Commission's contentions that the competing applicant was not a person aggrieved by the grant. Similarly, in the *Frequency Broadcasting Corp.* case, supra, this Court, upon motion of the Commission, dismissed an appeal taken by an applicant directed against the action of the Commission in granting a mutually exclusive construction permit application and designating the application of the appellant for hearing. In that case, as in the *Palmer* case and in the present case, the Commission had granted one of two mutually exclusive applications and set the other for hearing in accordance with the procedure outlined above. The appellant, whose application had been designated for hearing appealed and, as here, the Commission moved to dismiss the appeal upon the ground that appellant was not a person having a right or interest which was aggrieved or adversely affected. As in the *Palmer* case, the Court dismissed the appeal, thereby upholding the Commission's contention.

[fol. 36] It is clear from the foregoing cases and the provisions of the Communications Act that appellant is not a person aggrieved or one who has any rights or interests adversely affected by the grant to Fetzer. Accordingly, appellant has no standing to appeal the grant to Fetzer,

and the Commission's Motion to Dismiss the Appeal should be granted.

Federal Communications Commission.
(Signed.) Charles R. Denny, General Counsel, Harry M. Plotkin, Assistant General Counsel; (S.) Joseph M. Kittner, Counsel.

Acknowledgment of Service

Service of "Appellee's Motion to Dismiss the Appeal" and "Brief in Support of the Motion ot Dismiss Appeal" acknowledged this 27 day of October, 1944.

Harold G. Cowgill, Counsel for Appellant; Reed T. Rollo, Counsel for Intervenor.

[fol. 37] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF INTENTION TO INTERVENE—Filed October 30, 1944

Come now John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, and pursuant to Section 402(d) of the Communications Act of 1934, as amended, give notice of their intention to intervene in the above entitled cause for the reasons set forth below in the Statement of Intervener's Interest.

Statement of Intervener's Interest

Intervener is interested in this proceeding, and it would be aggrieved and its interests adversely affected by a reversal of the decision of the Federal Communications Commission appealed from herein, for the following reasons:

1. John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, filed with the Federal Communications Commission, on March 20, 1944, an application for construction permit to erect a new standard broadcast station at Grand Rapids, Michigan to operate on the frequency 1230 kilocycles with 250 watts power, unlimited time. On June 27, 1944 the Commission, finding that a grant of the application would serve public interest, convenience and necessity, granted the same pursuant to Section 309(a) of the Communications Act of 1934, and a

permit to construct Station WJEF was issued to intervener in pursuance of that action.

2. Appellant is licensed to operate Station WKBZ at Muskegon, Michigan on the frequency 1490 kilocycles with 250 watts power, unlimited time. On May 5, 1944 it filed an application for construction permit to change its frequency to 1230 kilocycles. The simultaneous use of 1230 [fol. 38] kilocycles at Grand Rapids, Michigan and Muskegon, Michigan, cities separated by a distance of approximately fifty miles, would result in intolerable interference to both stations and, therefore, appellant's application and intervener's application were mutually exclusive. The Commission was unable to find, upon a comparative examination of the aforesaid applications that the grant of appellant's application would serve public interest, convenience or necessity and, on June 27, 1944, the application was designated for hearing. It is now scheduled on the Commission's docket for hearing on December 5, 1944.

3. Appellant thereafter filed a petition for hearing, rehearing or other relief, requesting that the Commission (1) reconsider and set aside its action of June 27, 1944 in granting intervener's application, (2) designate both applications for hearing, or (3) in the alternative, stay the issuance of any construction permit for the use of 1230 kilocycles at Grand Rapids until action should be taken upon the petition and until appellant should have had an opportunity to file a notice of appeal pursuant to Section 402(b)(2) of the Communications Act of 1934. This petition was wholly denied by the Federal Communications Commission on September 12, 1944. The Commission, in its decision and order on said petition, found that the grant of intervener's application did not contravene Section 307(b) of the Communications Act of 1934 and Section 3.24 of the Rules and Regulations of the Commission, as claimed by appellant, and that, in fact, the grant would result in the establishment of a new service to a very substantial population and without objectionable interference with any existing service area, whereas the slight increase in radio service which would result in the grant of appellant's application would be offset by objectionable interference to another station. These conclusions are amply supported by the technical data filed with the two applications. The Com-

mission likewise found that the grant of intervener's application was consistent with the provisions of Section 3.35 of its Rules and Regulations, that no valid reason had been disclosed for setting aside the action of June 27, 1944 granting intervener's application, nor any reason for staying the grant to intervener pending the filing of appellant's notice of appeal.

[fol. 39] 4. A reversal of the decision of the Commission as requested by appellant would deprive intervener of its permit to construct a radio station in Grand Rapids and of an invaluable right to give to the City of Grand Rapids the additional broadcasting service to which it is entitled.

John E. Fetzer and Rhea Y. Fetzer, doing Business as Fetzer Broadcasting Company, (Signed) by Louis G. Caldwell, Reed T. Rollo, E. D. Johnston, Its Attorneys, 914 National Press Building, Washington, D. C.

Duly sworn to by Reed T. Rollo; jurat omitted in printing.

October 28, 1944.

[fol. 40] Acknowledgment of Service

Receipt of a true copy of the foregoing Notice of Intention to Intervene and Statement of Intervener's Interest is acknowledged this 30th day of October, 1944.

Ashbacker Radio Corporation, by (Signed) Philip J. Hennessey, Jr., Attorney for Appellant. Federal Communications Commission, By (Signed) Harry M. Plotkin, Attorney for Appellee.

[fol. 41] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

OPPOSITION TO MOTION FOR STAY ORDER—Filed October 30, 1944

Come now John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, intervener

herein, and oppose the motion for stay order filed by the appellant.

Opposition to Motion

1. John E. Fetzer and Rhea Y. Fetzer are partners doing business as Fetzer Broadcasting Company. As such partnership, they have this day filed Notice of Intention to Intervene and Statement of Intervener's Interest in the appeal taken by Ashbacker Radio Corporation from a decision of the Federal Communications Commission on June 27, 1944 granting intervener's application for construction permit for a new standard broadcast station to operate at Grand Rapids, Michigan on the frequency 1230 kilocycles, with 250 watts power, unlimited time.

2. Ashbacker Radio Corporation holds a license from the Commission authorizing the operation of Station WKBZ at Muskegon, Michigan on the frequency 1490 kilocycles with 250 kilowatts power, unlimited time. On May 5, 1944, after Fetzer Broadcasting Company had filed its application for construction permit on March 20, 1944, appellant filed an application for authority to operate WKBZ on 1230 kilocycles instead of its present frequency. The two applications were mutually exclusive because of the destructive electrical interference which would result from their simultaneous operation on 1230 kilocycles. The WKBZ application was designated for hearing upon the same date that the Fetzer application was granted. Ashbacker Radio Corporation filed a petition for "hearing, rehearing, or other relief" and it was denied on [fol. 42] September 12, 1944. In the Commission's decision and order upon the petition it compared the merits of the two applications and found, upon the basis of data filed with the applications, that WKBZ would serve approximately 3972 additional potential listeners at night and 9815 additional potential listeners in the daytime, if operated on 1230 kilocycles, whereas the Fetzer station at Grand Rapids would provide a new service to a population of approximately 202,800 at night and 238,800 in the daytime. The Commission found, also, that WKBZ would cause objectionable interference to about 5% of the primary daytime service area of a third station, whereas the Fetzer station would not cause objectionable interference to any existing station. It concluded, therefore, that

the grant complained of did not contravene Section 307(b) of the Communication's Act of 1934 and Section 3.24 of the Rules and Regulations of the Commission insofar as they require the Commission to provide a fair, efficient and equitable distribution of radio service among the several states and communities. The Commission likewise found that the grant was not contrary to Section 3.35 of the Commission's Rules and Regulations, as contended by appellant, and that no valid reason had been disclosed for setting aside the grant to the Fetzer Broadcasting Company.

3. Appellant asks the Court to issue an order to the Commission suspending, pending determination of the appeal, the effectiveness of the Commission's actions of June 27, 1944 and September 12, 1944 granting intervener the authorization of which appellant complains. Appellant alleges in support of its motion that there is no plain adequate or speedy remedy to prevent irreparable injury to the appellant and to the public other than the issuance of an order of stay by this Court.

It is generallly recognized that a stay order may be obtained by those, and only those, having a right to appeal and who are affected by the decision in question. Appellant bases its right to appeal on Section 402(b)(2) of the Communications Act of 1934, which section provides that an appeal may be taken from decisions of the Commission by a person aggrieved or whose interests are adversely affected by a decision granting or refusing certain types of applications, of which intervener's application is [fol. 43] one. Appellant's complaint is that intervener's application was granted without a hearing while appellant's application was designated for hearing. That is true, but the Commission is empowered, under Section 309(a) of the Communication's Act, to grant applications without a hearing when it finds that public interest, convenience or necessity will be served by the grant. It so found when it considered intervener's application and it, therefore, granted it. Since it did not find that a grant of appellant's application would serve public interest, convenience, or necessity, it designated that application for hearing, which was all that it was required to do. The application is now scheduled for hearing on December 5 and appellant can

not properly assume that the hearing will not conform to constitutional requirements. This being the case, appellant is not aggrieved and its interests are not adversely affected by the grant of the application of the Fetzer Broadcasting Company. It follows that appellant does not have an appealable interest under Section 402(b)(2) of the Communication's Act and is not entitled to a stay order.

4. Appellant does not state that irreparable injury will result to itself or to the public if a stay of the Commission's decision is not issued. It does not allege that WKBZ will suffer electrical interference from the operation of the proposed Fetzer station, nor does it state that it will suffer any economic injury. It could not support such allegations, if made. To be entitled to a stay, appellant must show a reasonably anticipated irreparable injury and it should appear that such injury is imminent. Such anticipated injury must be real and not imaginary. Appellant has not shown that it will suffer such an injury. Neither has it shown that any irreparable injury will result to the public if a stay is not issued pending determination of the appeal. The indications are to the opposite effect, in fact, because the small segment of the public which would receive additional service if WKBZ operated upon 1230 kilocycles instead of its present frequency is in the same position that it was prior to the Commission's decision, and that position will not change, while a much larger portion of the public will the sooner receive an additional service, that from the proposed Fetzer station, if the Fetzer Broadcasting Com- [fol. 44] pany is permitted to proceed with the construction authorized.

Wherefore, the premises considered, it is submitted that appellant's motion for stay order should be denied.

John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company. By (Signed) Louis G. Caldwell, Reed T. Rollo, E. D. Johnston, Its Attorneys, 914 National Press Building, Washington, D. C.

October 28, 1944.

Acknowledgment of Service

Service of the foregoing Opposition to Motion to Stay Order is hereby acknowledged and a true copy thereof received this 30th day of October, 1944.

(Signed) Philip J. Hennessey, Jr. Counsel for Ashbacker Radio Corporation. Harry M. Plotkin, Counsel for Federal Communications Commission.

[fol. 45] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

REPLY TO INTERVENERS' OPPOSITION TO MOTION FOR STAY—Filed November 2, 1944

Both the Commission and the Intervenors oppose the issuance of a stay order on the ground that the Court lacks jurisdiction of this appeal. Obviously, unless the Court has jurisdiction, any stay order will be a nullity and may be disregarded. But the issue of jurisdiction should properly be, and has been, raised by a motion to dismiss filed by the Commission on October 27, 1944. The fact that this motion to dismiss is pending and undecided is a further reason for maintaining the status quo.

There is a significant divergence of views between the Commission and the Intervenors on their second common ground of opposition—that a stay order is unnecessary. The Commission asserts that it may rescind the Intervenors' construction permit after a hearing upon, and limited to, appellant's application. The Intervenors are careful not to adopt this argument. Clearly, if the Commission should attempt to revoke their construction permit, the Intervenors would demand a hearing upon their own application in addition to the right, already accorded them by the Commission, of participating in the hearing upon the Ash- [fol. 46] backer application. Yet, both the Commission and the Intervenors deny that the appellant has identical reciprocal rights to be heard upon both applications.

The Intervenors argue that a stay order is unnecessary

to prevent irreparable injury to appellant and to the public in the Muskegon area. But they also argue, inconsistently, that the issuance of a stay order will, in fact, cause irreparable injury to them and to the public in the Grand Rapids area. All that appellant asks is that both parties be returned to the positions they occupied prior to the Commission's decision and that they continue in those positions until this appeal is decided. No one could be prejudiced by such a course.

As the Supreme Court pointed out in the Scripps-Howard case, 316 U. S. 4:

> "No Court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a Court can do. But within these limits, it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong."

A stay order in this case is necessary to prevent not merely those changes which will occur through mere lapse of time but, as well, changes which are currently being brought about by the affirmative actions of the Intervenors themselves in constructing their station at Grand Rapids.

Respectfully submitted, Ashbacker Radio Corporation. By Philip J. Hennessey, Jr., George S. Smith, Harold G. Cowgill, Segal, Smith & Hennessey, 1026 Woodward Building Washington 5, D. C. Attorneys for Appellant.

November 2, 1944.

[fol. 47] Acknowledgment of Service

Service of a copy of appellant's "Reply to Intervenors' Opposition to Motion for Stay" is acknowledged this 2nd day of November, 1944.

Harry M. Plotkin, Counsel for Appellee. Reed T. Rollo, Counsel for Intervenors.

[fol. 48] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

OPPOSITION TO MOTION TO DISMISS—Filed Nov. 9, 1944

Appellant opposes the Commission's motion to dismiss this appeal for the reasons hereinafter set forth.

I

The Facts

The Commission's motion to dismiss discloses that the parties are in agreement upon all material facts—the Ashbacker and Fetzer applications were filed from the same section of Michigan for the same unused frequency, were presented to the Commission for action on the same day under the same law and regulations. Upon a "comparative consideration of the two applications," without hearing, the Commission granted the Fetzer application. It cannot now grant the Ashbecker application without rescinding its grant to Fetzer and, unless directed to do so by this Court, it will not hold a comparative hearing upon both applications at any time.

II

The Issues

The immediate issue raised by the Commission's motion to dismiss is one of appellate jurisdiction—whether Ap- [fol. 49] pellant has a sufficient interest in the Fetzer application to qualify as a person "aggrieved or adversely affected" within Sec. 402(b)(2) of the Communications Act. If so, the Court has jurisdiction to consider this appeal; if not, the motion to dismiss must be granted.

But there is more at stake than Appellant's statutory right of appeal. Appellant's interest, or lack of interest, in the Fetzer application also determines:

(1) Appellant's right to a comparative hearing before the Commission.

(2) Whether a hearing limited to Appellant's application is sufficient.

(3) The power of the Commission, after a hearing limited to the Ashbacker application, to rescind the construction permit issued to Fetzer.

(4) Appellant's right to any rehearing under Sec. 405 of the Act.

In short, when it acts upon this motion to dismiss, the Court fixes the rights of conflicting applicants throughout the whole procedural scheme of the Communications Act.

III

Argument

1. *Appellant's Right to a Comparative Hearing Before the Commission.*

This case is squarely within this Court's decision in *Symons Broadcasting Company* v. *Federal Radio Commission*, 62 App. D. C. 46, 64 Fed. (2d) 381 and the motion to dismiss cannot be granted without overruling the Symons case. In each instance, there was pending before the Commission at the time it granted one application a conflicting application for the same facilities. In the Symons case, [fol. 50] the Court said:

> "* * * we think it not untimely to say that in granting and refusing applications for licenses, where two or more stations are applicant for the same frequency it is the duty of the commission to grant either party asking it a hearing on due notice, for otherwise there is a denial of due process and a substitution in its place of arbitrary power, and that, of course, may not be countenanced. * * *"

The Symons decision, moreover, construed Sec. 11 of the Radio Act of 1927. In the following year, Congress reenacted Sec. 11 of the Radio Act as Sec. 309(a) of the Communications Act of 1934 and, having used identical language in both sections, must be assumed to have adopted the construction placed upon the words in the Symons decision.

In *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, the Supreme Court

expanded the doctrine of the Symons case to embrace conflicting applications, however far separated in filing date, pending before the Commission at any one time.

Other decisions of this Court, including those upon which the Commission relies, are readily distinguishable.

In *Telegraph Herald Company* v. *Federal Radio Commission*, 62 App. D. C. 240, 66 Fed. (2d) 220, the Appellant had not filed a formal application.

In *Colonial Broadcasters, Inc.*, v. *Federal Communications Commission*, 70 App. D. C. 258, 105 Fed. (2d) 781, Appellant filed its application more than a month after the Commission had designated the conflicting Lucas application for hearing.

In *Palmer* v. *Federal Communications Commission*, #7542, February 16, 1940, unreported, the Palmer application was filed more than a month after the Commission had designated the Wilson and Schuman application for hearing.

In *Frequency Broadcasting Corp.*, v. *Federal Communications Commission*, #8055, April 26, 1942, the Commission [fol. 51] had actually approved Appellant's application on the condition that it amend for another frequency equally available.

Until 1939, it was the Commission's established practice, under Rules with which this Court is familiar, to designate conflicting applications for consolidated hearing. These Rules recognized two types of conflict:

(a) *Patent* conflicts, apparent on the face of the application as in this case. Under these circumstances, Sec. 106.4 of the Commission's Rules provided:

> "In fixing dates for hearings the Commission will, so far as practicable, endeavor to fix the same date for hearings on all related matters which involve the same applicant, or arise out of the same complaint or cause; and for hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature, excepting, however, applications filed after any such application has been designated for hearing."

See *Colonial Broadcasters, Inc.*, v. *Federal Communications Commission*, 70 App. D. C. 258, 105 Fed. (2d) 788.

(b) *Latent* conflicts not readily apparent from the application itself. Under these circumstances, the Commission had its "protest" rule (originally Sec. 45 FRC Rules & Regulations) which provided:

"45. In any case where an application is granted in whole or in part without a hearing as provided in paragraph 44, any person, firm, or corporation aggrieved or whose interests are adversely affected by such grant, may obtain a hearing upon said application by adhering to the following procedure:

"a. Such parties shall, within 20 days from the date on which public announcement of such grant is made at the principal office of the Commission, or from its effective date if a later date is specified by the Commission, file with the Commission and serve upon or mail to the applicant a protest in writing directed to the action of the Commission making such grant.

"b. • • •

"c. Upon receipt by the Commission of such protest the application involved will be set for hearing in the same manner in which other applications are set for hearing and the applicant and other parties in interest notified thereof: *provided, however,* That upon such [fol. 52] hearing the verified protest shall be taken as a pleading limiting the issues to be tried, but not as evidence of the facts therein stated."

See *Symons Broadcasting Company* v. *Federal Radio Commission*, 62 App. D. C. 46, 64 Fed. (2d) 381.

Although no changes were made in the statute itself, both these rules were abolished by the Commission in 1939 and it now asserts the right, in its discretion, and in the absence of any rule of its own which might limit that discretion, to conduct consolidated hearings upon conflicting applications or related hearings on the same day, or unrelated hearings on different days.

But the Commission is still required by Sec. 309(a) of the Communications Act and the due process clause of the Fifth Amendment to grant a fair and adequate hearing to every applicant before his application is denied. The decision in the *Symons* case stands upon this broad statutory and constitutional base. Under the circumstances of this

case, the requirements of a fair and adequate hearing can be met only by affording Ashbacker and Fetzer a comparative hearing.

2. *A Hearing Limited to Appellant's Application is Insufficient.*

On the same day that the Commission granted the Fetzer application it designated the Ashbacker application for a unilateral, non-comparative hearing now scheduled for December 5, 1944. It asserts that Appellant is entitled to no more, either under Sec. 309(a) of the Act or the Fifth Amendment.

This Court has expressed itself unmistakably on after-the-fact proceedings of this character. If Congress meant anything by the word "hearing" it meant a fair and adequate opportunity after notice and upon issues clearly defined to assert and defend rights *before* decision. *Saltzman* v. *Stromberg-Carlson Company*, 60 App. D. C. 31, 46 Fed. (2d) 612, *Courier-Journal Company* v. *Federal Radio* [fol. 53] *Commission*, 60 App. D. C. 33, 46 Fed. (2d) 614, *Westinghouse E. & M. Company* v. *Federal Radio Commission*, 60 App. D. C. 53, 47 Fed. (2d) 415.

The real nature of the "hearing" which the Commission intends to hold on December 5, 1944 is evident from the Commission's own application forms. When filed, both the Ashbacker and Fetzer applications requested the *unused* frequency of 1230 kilocycles. Each application form contained the question:

> "Does applicant request the assignment of all or any part of the facilities (i. e., frequency, power, and/or hours of operation) now assigned to any other station or stations?"

To this question each applicant answered "No."

The hearing now offered Appellant is not a hearing upon its application as filed. The Fetzer application having been granted, Appellant cannot now undertake to justify operation of its station on an unused frequency. Instead it has been saddled with the burden of showing that the new station of Fetzer (WJEF) should have its license modified or revoked. Without Appellant's consent and over its protest the Commission has amended its application in this vital

respect. Further, the Commission allowed Fetzer to intervene in the hearing upon, and limited to, the Ashbacker application because it finds that Fetzer has an interest in the Ashbacker application even while it denies that Ashbacker has any interest in the Fetzer application!

3. *After a Hearing Limited to the Ashbacker Application, the Commission Cannot Rescind Fetzer's Construction Permit*

The Commission represents that after a hearing upon, and limited to, the Ashbacker application, it may rescind Fetzer's construction permit. Otherwise, of course, the December 5 proceeding becomes a mere post-mortem.

The grant to Fetzer, purportedly under Sec. 309(a) of the Act, was made with full knowledge that the Ashbacker [fol. 54] application was pending; that the two applications were mutually exclusive; and that if either were granted, the other must be denied.

If it was lawful for the Commission to grant the Fetzer application under these circumstances, then the Commission is required by Sec. 319(a) of the Act to issue Fetzer a license as soon as the station is constructed. Thereafter, the Commission cannot revoke or modify Fetzer's license except upon due notice and hearing as required by Secs. 303(f) and 312(b) of the Communications Act.

Any hearing upon the Ashbacker application is a collateral proceeding and the Commission's Notice of Hearing to Ashbacker clearly recognizes this fact. This Notice does not even suggest that any revocation, modification or suspension of the Fetzer station license is contemplated by the Commission.

A revocation of the Fetzer station license without according Fetzer a hearing would be consonant with the actions taken upon the Ashbacker application but it would compound, rather than cure, the original error.

4. *Appellant's Right to a Rehearing under Sec. 405 of the Act*

Sec. 405 of the Act is the statutory equivalent of the Commission's former "protest rule." It provides a method for curing errors in administrative proceedings without re-

course to the courts. It may be invoked by any party or "any person aggrieved or whose interests are adversely affected" by a decision of the Commission and thus is co-extensive in scope with Sec. 402(b)(2) of the Act.

When the Commission denied Appellant's Petition for Hearing, Rehearing and Other Relief, it was construing a statutory enactment rather than one of its own rules. Despite the decision in the *Symons* case it refused to accord Appellant the fair comparative hearing to which Appellant was entitled under the Act and the Constitution.

[fol. 55] 5. *Appellant is Entitled to Maintain this appeal under Sec. 402(b)(2) of the Act*

For all the reasons that entitled Appellant to a hearing in the first instance and later to some appropriate form of relief under Sec. 405 of the Act, it is "aggrieved and adversely affected" within the meaning of Sec. 402(b)(2).

The Commission has steadfastly declined to ascribe any meaning to the words "aggrieved or adversely affected" in Sec. 402(b)(2). It contended that economic interest in an application was insufficient to give this Court jurisdiction in *Sanders Bros.* v. *Federal Communications Commission*, 309 U. S. 470, 642. It contended that electrical interference was insufficient in *National Broadcasting Company, Inc., (KOA)* v. *Federal Communications Commission*, 319 U. S. 239. It now takes the extreme position that one of two flatly conflicting applicants has no such interest in the other as entitles it to hearing or to appeal.

Unless this Court has jurisdiction of this appeal under Sec. 402(b)(2) of the Act, there can be no judicial review of the Commission's action. *Black River Valley Broadcasts, Inc.*, v. *McNinch, et al.*, 69 App. D. C. 311, 101 Fed. (2d) 235. If the motion to dismiss is granted, the Commission thus becomes the sole and final judge of its own action in this and similar cases.

IV

Conclusion

We respectfully request that the motion to dismiss be denied or, in the alternative, in view of the important ques-

[fol. 56] tions of public and private interest which are involved, that the motion to dismiss and this opposition be designated for oral argument.

Respectfully submitted, Ashbacker Radio Corporation, by Philip J. Hennessey, Jr., George S. Smith, Harold T. Cowgill, Segal, Smith & Hennessey, 1026 Woodward Building, Washington 5, D. C., Attorneys for Appellant.

November 9, 1944.

Acknowledgment of Service

Service of a copy of Appellant's "Opposition to Motion to Dismiss" is acknowledged this 9th day of November, 1944.

Harry M. Plotkin, Washington, D. C., Counsel for Appellee; E. D. Johnston, National Press Bldg., Washington, D. C., Counsel for Intervenors.

[fol. 57] Copy

In United States Court of Appeals for the District of Columbia, January Term, 1945

No. 8871

Ashbacker Radio Corporation, Appellant,

vs.

Federal Communications Commission, Appellee,

Fetzer Broadcasting Company, Intervenor

Before: Groner, C. J., and Miller and Edgerton, JJ.

Order Dismissing Appeal—Filed January 24, 1945

This cause came on to be heard on the notice of appeal, the notice of intention to intervene, and on appellee's motion to dismiss the appeal and appellant's objections thereto.

On consideration whereof, It is ordered and adjudged by the Court that the motion to dismiss be granted, and that this appeal be, and it is hereby, dismissed.

Per Curiam.

Dated January 24th, 1945.

[File endorsement omitted.]

[fol. 58] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed April 23, 1945

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Notice of Appeal.
2. Motion for Stay Order.
3. Opposition to Motion for Stay Order.
4. Motion to Dismiss (Commission's).
5. Notice of Intention to Intervene (Fetzer B/C Co.).
6. Intervenor's opposition to motion for stay order.
7. Appellant's reply to intervenor's opposition to motion for stay.
8. Appellant's answer to motion to dismiss.
9. Per curiam order dismissing appeal.

Paul M. Segal, Woodward Building, Washington 5, D. C., Attorney for Ashbacker Radio Corporation.

April 23, 1945.

[fol. 59] Acknowledgment of Service

Receipt of a copy of Appellant's "Designation of record" is hereby acknowledged this 23rd day of April, 1945.

Harry M. Plotkin, Washington, D. C., Counsel for Appellee; Reid T. Rollo, National Press Bldg., Washington, D. C., Counsel for Intervenors.

fol. 60] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on Cover: File No. 49,649. U. S. Court of Appeals, District of Columbia. Term No. 1196. Ashbacker Radio Corporation, Petitioner, vs. Federal Communications Commission. Petition for a writ of certiorari and exhibit thereto. Filed April 24, 1945. Term No. 1196 O. T. 1944.

[fol. 61] Supreme Court of the United States

Order Allowing Certiorari—Filed May 28, 1945

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

(9630)

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1196

ASHBACKER RADIO CORPORATION, a Michigan Corporation,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PAUL M. SEGAL,
GEORGE S. SMITH,
PHILIP J. HENNESSEY, JR.,
1026 Woodward Building,
Washington 5, D. C.
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Your petitioner respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a petition for a writ of certiorari to review an order of the United States Court of Appeals for the District of Columbia entered without opinion January 24, 1945,

by a panel of three judges, dismissing an appeal of the petitioner from a decision of the Federal Communications Commission granting without hearing an application of one Fetzer Broadcasting Company which application was in conflict with and mutually exclusive of a pending application of the petitioner.

B.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 23, 1925, and Section 402(e)* of the Communications Act of 1934, on the ground that the order of the Court below deprives the petitioner of the hearing upon its application which is provided for by Sections 309(a)* and 319(a)* of the Communications Act of 1934 and deprives it of the appeal provided for by Section 402(b)(2)* of that Act.

C.

QUESTIONS PRESENTED.

When there are pending before the Federal Communications Commission two conflicting mutually-exclusive applications from the same area for the same wave-length assignment:

1. May the Commission lawfully grant one of these applications, ex parte, and simultaneously set down the other application for hearing?
2. If so, is the "hearing" thus offered, in face of the accomplished grant of the competing application, such a fair hearing as is provided for by the Communications Act of 1934 and guaranteed by the Fifth Amendment to the Constitution of the United States?

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* Reprinted in the Appendix.

3. Does such grant to one of two competing applicants for the same facility aggrieve the other applicant or adversely affect his interests so as to bring him within the class of persons permitted to sue out an appeal to the United States Court of Appeals for the District of Columbia under Section 402(b) (2)* of the Communications Act of 1934?

D.

MATERIAL FACTS AND PROCEEDINGS BEFORE THE FEDERAL COMMUNICATIONS COMMISSION AND THE COURT BELOW.

The petitioner is the licensee of WKBZ, the only broadcasting station at Muskegon, Michigan. The frequency assigned the petitioner, 1490 kilocycles, is one of poor propagation characteristics so that petitioner is not able to provide a satisfactory service to the entire Muskegon area.

A substantial improvement in the petitioner's service could be accomplished by use of the frequency 1230 kilocycles, heretofore available for assignment in the Muskegon area. It has been ascertained that the frequency 1230 kilocycles is the only frequency now available in the Muskegon area which might be used to improve the petitioner's service.

Accordingly, on April 29, 1944, the petitioner filed with the Federal Communications Commission an application denominated "for construction permit", dated April 27, 1944, requesting a change in frequency to 1230 kilocycles.

This application was in conflict with an application filed March 20, 1944 by the Fetzer Broadcasting Company for a new station to operate at 1230 kilocycles at Grand Rapids, Michigan. It is agreed that the two applications were in conflict and mutually exclusive. It is entirely impossible for the two applicants to use the same frequency and either of them render any service whatsover.

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* Reprinted in the Appendix.

The two applications were studied by the Legal, Engineering and Accounting Divisions of the Commission, which submitted their several recommendations *ex parte*. Both applications came before the Commission at a meeting held June 27, 1944. On June 28, 1944, the Commission announced that, without hearing, it had granted the Fetzer application and had "designated for hearing" the petitioner's application.

The petitioner is without information as to what reasons may have actuated the Commission in this step. The petitioner believes its application was, in the public interest, superior to the Fetzer application and, had the petitioner been accorded a hearing upon its application or an opportunity to test, at a public hearing, such claims or representations as might have been made on behalf of the Fetzer application, the petitioner would probably have demonstrated that, in the public interest, its application should have been granted and the Fetzer application denied.

Accordingly, pursuant to Section 405* of the Communications Act of 1934, the petitioner filed with the Commission a request for hearing, rehearing or other relief. It recited the foregoing and further pointed out: that the community of Grand Rapids wherein Fetzer was being authorized to construct a new station, was already receiving adequate service from two existing stations; that in addition, station WKZO at Kalamazoo, Michigan, also owned and operated by Fetzer already maintained studios at Grand Rapids and claimed coverage of that community; that the proposed grant to Fetzer violated Section 3.24* of the Rules and Regulations of the Commission in that it provided an additional service to a commuuity already well served, at the expense of the listeners in the vicinity of Muskegon, who do not now have a single primary service; that the grant results in common ownership of two stations, each of which renders a primary service to a substantial percentage of the primary service area of the other, con-

* Reprinted in the Appendix.

trary to Section 3.35* of the Commission's regulations. It was argued that the action of the Commission denied the petitioner the fair hearing to which each applicant is entitled under the Communications Act of 1934.

Fetzer filed an opposition to the foregoing petition. The Commission (one Commissioner dissenting and two not participating) on September 12, 1944, published its "Decision and Order on Petition for Hearing, Rehearing and Other Relief"*, and denied the petition of the petitioner. The decision of the Commission contains elaborate recitals of fact under a heading which begins, "A comparison of important facts relating to the two applications indicates the following: . . .", which facts were obtained and evaluated by the Commission *in camera* without according the petitioner any opportunity to cross-examine witnesses or to adduce testimony in explanation or rebuttal. The decision of the Commission also alleges that

> "... the Commission has not denied petitioner's application. It has designated the application for hearing as required by Section 309(a) of the Act. At this hearing, petitioner will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944."

While the foregoing petition was pending and before the Commission decision thereon, the Commission, on August 1, 1944, issued and served upon the petitioner a notice setting up a proposed "hearing" upon the petitioner's application and prescribing the issues upon which it was proposed to hold the purported hearing. This notice stated that the application of the petitioner would not be granted by the Commission unless the issues specified in the notice were determined in favor of the applicant on the basis of a record duly and properly made by means of a formal hearing.

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* Reprinted in the Appendix.

Among the issues thus required to be determined in favor of the petitioner was the question whether any interference which would result from the simultaneous operation of the petitioner's station and the station which the Commission had just authorized for Fetzer.

Since it is conceded that the petitioner and Fetzer cannot use 1230 kilocycles simultaneously without destructive interference, it was obvious that the purported hearing was one in name only and that the grant of the Fetzer application was designed and intended as a denial without hearing of the petitioner's application.

Accordingly, pursuant to Section 402(b)(2)* of the Communications Act, the petitioner filed its notice of appeal to the United States Court of Appeals for the District of Columbia.

On October 27, 1944, the Commission filed a motion to dismiss the appeal on the claim that the Court had no jurisdiction under Section 402(b) to entertain it.

On November 9, 1944, the petitioner filed its opposition to this motion.

On January 24, 1945, the Court granted the Commission's motion and dismissed the appeal.

Since this action was taken by order *per curiam*, without opinion, it may be assumed that the Court acted on the allegations and reasoning set up in the Commission's brief in support of its motion to dismiss: that the two applications were mutually exclusive; that the Commission had made a "comparative examination of the two applications" and "found" the grant of the Fetzer application would serve public interest and had hence granted it while setting the petitioner's application for hearing; that the Commission in denying the petitioner's subsequent request for hearing had relied on all "facts" set up in the opinion thereon; that these actions did not constitute a denial of the petitioner's application; that hence the petitioner was not aggrieved or adversely affected within the meaning of

* Reprinted in the Appendix.

Section 402(b)(2) of the Communications Act; that the results of the petitioner's hearing cannot be foretold; that the Commission might, in future, in some way "modify" the Fetzer license or refuse to renew it,* that the petitioner's "opportunity to press its application to the fullest has in no way been impaired by a grant of the competing Fetzer application."

Whether or not the Court followed this argument, it did overrule, without opinion, its earlier decision in *Symons Broadcasting Company* v. *Federal Radio Commission* (1933), 62 App. D. C. 46.**

If the Court can further be assumed to have ruled that the "hearing" offered the petitioner was a fair hearing, then the Court also overruled, without opinion, its earlier decision in *Chicago Federation of Labor* v. *Federal Radio Commission* (1930), 59 App. D. C. 333, which imposed a far more heavy burden than proving "public interest, convenience and necessity would be served," in the special case of the applicant who seeks to supplant an existing station.***

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* As a matter of fact, the Commission issues licenses for three-year periods.

** Wherein it was said, at page 47:

"And in addition to this, we think it not untimely to say that in granting and refusing applications for licenses, where two or more stations are applicant for the same frequency, it is the duty of the commission to grant either party asking it a hearing on due notice, for otherwise there is a denial of due process and a substitution in its place of arbitrary power, and that, of course, may not be countenanced."

*** At page 334 it is said:

"It is not consistent with true public convenience, interest, or necessity, that meritorious stations like WBBM and KFAB should be deprived of broadcasting privileges when once granted to them, which they have at great cost prepared themselves to exercise, unless clear and sound reasons of public policy demand such action. The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced, if the licenses of estab-

E.

REASONS FOR GRANTING THE WRIT.

(1) *The Court below nullified the right to judicial review conferred by Section 402 (b)(2) of the Communications Act of 1934, upon a class of persons who are aggrieved or whose interests are adversely affected, namely competitive applicants.*

This is a question of substance relating to the construction and application of a statute of the United States which has not been, but should be, settled by this Court.

Heretofore, it has been the rule in the Court below (the court having exclusive jurisdiction in the field) that such applicants were entitled to appear. *Symons Case, supra.*

But the Commission has followed the policy of attempting to circumscribe the definitions of permissive appellants.

This Court has granted a writ of certiorari in *Federal Communications Commission* v. *National Broadcasting Company, et al.* (1943), 319 U. S. 239, wherein it was held that a licensee of a station which would receive interference from the operation of another station as a result of the grant complained of was entitled to appeal as a person aggrieved. See also *Scripp-Howard Radio, Inc.* v. *Federal Communications Commission* (1942), 316 U. S. 4.

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lished stations should arbitrarily be withdrawn from them and appropriated to the use of other stations. This statement does not imply any derogation of the controlling rule that all broadcasting privileges are held subject to the reasonable regularity power of the United States, and that the public convenience, interest, and necessity are the paramount considerations."

To the same effect is *Journal Company* v. *Federal Radio Commission* (1931), 60 App. D. C. 92, 94: "Where a broadcasting station has been constructed and maintained in good faith, it is in the interests of the public and common justice to the owner of the station that its status should not be injuriously affected, *except for compelling reasons.*" (Emphasis supplied.) See also *Evangelical Luthern Synod* v. *Federal Communications Commission* (1939), 70 App. D. C. 270, 273 and *Yankee Network, Inc.* v. *Federal Communications Commission* (1939), 71 App. D. C. 11, 22.

This Court also granted a writ of certiorari in *Federal Communications Commission* v. *Sanders Brothers Radio Station* (1940), 309 U. S. 476, wherein it was held that a licensee likely to be financially injured by the issue of a license to another is a person having a sufficient interest to appeal.

The present question, relating to one who is affected by the grant of the conflicting mutually-exclusive application of another presents a correlative question which should be answered, particularly in view of the departure of the Court below from its previously-expounded position.

Moreover the solution will be of additional guidance to Circuit Courts of Appeals confronted with related questions of some perplexity arising from other administrative tribunals. *Associated Industries of New York State, Inc. v. Ickes, Secretary of the Interior, et al.* (C. C. A., 2d), 134 F. (2d) 694, *United States Cane Sugar Refiners' Association* v. *McNutt* (C. A. A., 2d), 138 F. (2d) 116, *Gilbert* v. *Securities and Exchange Commission* (C. C. A., 7th), December 20, 1944. See also *Simmons* v. *Federal Communications Commission*, —— U. S. App. D. C. ——, November 13, 1944.

Similar questions involving the participation of a competing applicant have arisen before the Civil Aeronautics Board. See *Northwest Airlines, Inc., Chicago-Milwaukee-New York Service*, C. A. B. Docket No. 629, December 16, 1944.

Heretofore the Federal Communications Commission, for its own administration, has held that competing applicants for the same wavelength in the same area were persons "aggrieved or whose interests were adversely affected" by the grant of one of the applications. *In the Matter of the Midnight Sun Broadcasting Company*, 6 F. C. C. 319.

(2) *In dismissing this appeal the Court has approved a procedural innovation of the Commsision by means of which it proposes to deny applications without according the hearing required by law but instead by according a nom-*

inal, inadequate and unfair hearing, the outcome of which is predetermined.

The Commission considers two competing applications. It forthwith grants one and permits a station to be established and commence regular operation. Meanwhile, it sets the other application for hearing. It notifies that applicant that his application will be denied if it should appear that the operation of his station will cause interference with the station which the Commission has just authorized. In simple terms that is what has happened in this case. It constitutes nothing less than the denial of an application without hearing.

The applicant having filed its application at approximately the same time as Fetzer, the two applications should have been heard upon a comparative basis for a determination of public interest. Instead, the Commission made an *ex parte* pre-selection of the Fetzer application on "facts" which the petitoner could not test. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company*, 227 U. S. 88.

If, and when the petitioner comes to its own "hearing," it is confronted with the necessity of overthrowing an expensively established existing station upon which the public has come to rely, which is an entirely different matter than making the comparative showing the statute indicates. *Chicago Federation of Labor Case, supra, Journal Company Case, supra, Yankee Network Case, supra, Evangelical Lutheran Synod Case, supra.*

After failure in that task, an appeal by the petitioner under Section 402(b) (1), applicable to those whose applications have been denied, would be a valueless and empty remedy.

The Commission is, of course, not unduly circumscribed in the type of hearing it must accord an applicant, but "the laws under which these agencies operate prescribe the fundamentals of fair play, they require that interested parties be afforded an opportunity for hearing and that judg-

ment must express a reasoned conclusion". *Federal Communications Commission* v. *Pottsville Broadcasting Company* (1940), 309 U. S. 134, 143-144.

The current *volte face* by the Commission, terminating hearings for conflicting applicants for the same facility is a use of a procedural confection to an unlawful purpose which (if the lower Court continues to permit it) represents a departure from the accustomed and usual course of administrative proceedings and of judicial proceedings such as to call for an exercise of this Court's power of supervision.

F.

CONCLUSION.

Wherefore, your petitioner prays that a writ of certiorari be granted under the seal of this Court directed to the United States Court of Appeals for the District of Columbia, and for such further relief as to this Court may seem proper.

Dated this 24th day of April, 1945.

PAUL M. SEGAL,
GEORGE S. SMITH,
PHILIP J. HENNESSEY, JR.,
1026 Woodward Building,
Washington 5, D. C.
Counsel for the Petitioner.

APPENDIX.

COMMUNICATIONS ACT OF 1934

Sec. 309(a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

* * *

Sec. 319(a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

* * *

Sec. 402(b) (1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modifi-

cation of an existing radio station license; whose application is refused by the Commission.

* * *

Sec. 402(b) (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

* * *

Sec. 402 (c) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are aribitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

* * *

Sec. 405. After a decision, order, or requirement has made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: *Provided, however,* That in the case of a decision, order, or requirement made under Title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission,

or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order.

* * *

RULES, REGULATIONS AND DECISIONS OF THE FEDERAL COMMUNICATIONS COMMISSION.

Section 3.24. *Broadcast facilities, showing required.* An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:

(a) That the proposed assignment will tend to effect a fair, efficient, and equitable distribution of radio service among the several states and communities.

(b) That objectionable interference will not be caused to existing stations or that if interference will be caused the need for the proposed service outweighs the need for the service which will be lost by reason of such interference. That the proposed station will not suffer interference to such an extent that its service would be reduced to an unsatisfactory degree. (For determining objectionable interference, see engineering Standards of Allocation and Field Intensity Measurements in Allocation.)

(c) That the applicant is financially qualified to construct and operate the proposed station.

(d) That the applicant is legally qualified. That the applicant (or the person or persons in control of an applicant corporation or other organization) is of good character and possesses other qualifications sufficient to provide a satisfactory public service.

(e) That the technical equipment proposed, the location of the transmitter, and other technical phases of operation

comply with the regulations governing the same, and the requirements of good engineering practice. (See technical regulations herein and Locations of Transmitters of Standard Broadcast Stations.)

(f) That the facilities sought are subject to assignment as requested under existing international agreements and the Rules and Regulations of the Commission.

(g) That the public interest, convenience, and necessity will be served through the operation under the proposed assignment.

• • •

Sec. 3.35. *Multiple ownership.* No license shall be granted for a standard broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substanital portion of the primary service area of another standard broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation.

• • •

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Corrected Copy

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

File No. B2-P-3590

In re Application of

JOHN E. FETZER AND RHEA Y. FETZER d/b as FETZER BROADCASTING COMPANY, GRAND RAPIDS, MICHIGAN

For Construction Permit

DECISION AND ORDER ON PETITION FOR HEARING, REHEARING AND OTHER RELIEF

By the Commission (Case, Commissioner, dissenting; Fly, Chairman and Wakefield, Commissioner, not participating):

The Commission has before it a petition filed (July 17, 1944) by Ashbacker Radio Corporation (WKBZ), Muske-

gon, Michigan, for hearing, rehearing or other relief, which is directed against the action of the Commission June 27, 1944 granting the application filed (March 20, 1944) by John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, Grand Rapids, Michigan, for construction permit (B2-P-3590) to erect a new standard broadcast station at that place to operate on the frequency 1230 kc with 250 watts power, unlimited time.

Petitioner's station, WKBZ, is licensed to operate on the frequency 1490 kc with 250 watts power, unlimited time. On May 5, 1944, petitioner filed an application for construction permit (B2-P-3609) requesting a change in frequency from 1490 kc to 1230 kc.

The simultaneous use of 1230 kc at Grand Rapids and Muskegon, Michigan would result in intolerable interference to both applicants, and therefore these applications are actually exclusive. The Commission on June 27, 1944, upon comparative examination of the two applications, found that a grant of the Fetzer application (B2-P-3590) would serve public interest, convenience and necessity, and accordingly, granted the same pursuant to Section 309(a) of the Communications Act of 1934. Since a grant of the Fetzer application precluded a grant without hearing of the Ashbacker application (B2-P-3609), the Commission on the same day designated the latter application for hearing in accordance with Section 309(a) of the Act.

The petition alleges that "WKBZ is the only station rendering a primary service to Muskegon County, population 107,852"; that upon its presently assigned frequency of 1490 kc, "and under the high attenuation conditions which prevail in that area", WKBZ is unable to render satisfactory service during daytime to those sections of the County more than 15.5 miles distant from its transmitter; that at night, WKBZ, is unable to render a satisfactory service to portions of greater Muskegon or to communities such as Fruitport and Laketon "which are normally tributary to Muskegon"; that the purpose of its application to change frequency "was to extend WKBZ's service to listeners who do not now receive primary service from any station"; that the City of Grand Rapids and portions of Kent County (where the new Fetzger station is to be located) now receive primary service from Stations WOOD (5kw—1300 kc—unlimited time) and WLAV (250 watts—1340 kc—unlimited time), both in Grand Rapids; and that a third sta-

tion at Grand Rapids operating with 250 watts, unlimited time on 1230 kc will simply provide "a third service for listeners already well served by these two existing stations".

The petition further alleges that Station WKZO at Kalamazoo, Michigan "with 5000 watts power, unlimited time on 590 kc renders primary service to Grand Rapids, advertises that its coverage to Grand Rapids is satisfactory and maintains studios at Grand Rapids". Upon information and belief, it is alleged that WKZO is owned and operated by Fetzer Broadcasting Company, a Michigan corporation, which is controlled by John E. Fetzer and Rhea Y. Fetzer, the applicant in B2-P-3590.

Based upon the foregoing allegations, petitioner contends that the grant of the Fetzer application and the designation of petitioner's application for hearing:

1. Contravenes Section 307(b) of the Communications Act of 1934 and Section 3.24 of the Rules and Regulations of the Commission in that "it provides an additional radio broadcasting service to a community already well served at the expense of the listeners in the vicinity of Muskegon who do not now have a single primary service";

2. Results in common ownership of two stations "each of which renders primary service to a substantial portion of the primary service of the other contrary to Section 3.35 of the Commission's Rules";

3. Denies to petitioners "the fair hearing to which every applicant is entitled under Section 309(a) of the Communications Act and attempts to substitute therefore a 'hearing' after all the issues between Ashbacker and Fetzer have been resolved in favor of Fetzer"; and

4. "Violates the due process clause of the Fifth Amendment to the Constitution of the United States".

Petitioner prays that the Commission reconsider and set aside its action granting the Fetzer application, designate both applications for a public hearing or, in the alternative, stay the issuance of the construction permit for the use of 1230 kc to Grand Rapids until action is taken upon this petition and until petitioner has had an opportunity to file its notice of appeal with the Court of Appeals pursuant to Section 402(b)(2) of the Communications Act of 1934.

On July 22, 1944, the opposition of Fetzer Broadcasting Company to the Ashbacker petition was filed.

A comparison of important facts relating to the two applications indicates the following:

A. UNITED STATES CENSUS FIGURES (1940)

Muskegon, Michigan:	Grand Rapids, Michigan:
Population, 47,697 (not a metropolitan center)	Population, 164,292 (Grand Rapids metropolitan district: population, 209,873)

B. SERVICE PROPOSED BY EACH

Ashbacker, Muskegon, Mich.		Fetzer, Grand Rapids, Michigan
Proposed nighttime service	81,629	Proposed (new) nighttime service 202,800
Present nighttime service	77,657	
Proposed gain service (about 5%)	3,972	
Proposed daytime service	107,340	Proposed (new) daytime service 238,800
Present daytime service	97,525	
Proposed gain in service (about 10%)	9,815	

C. INTERFERENCE TO EXISTING STATIONS FROM THE OPERATION OF EACH STATION AS PROPOSED

Ashbacker, Muskegon, Michigan	Fetzer, Grand Rapids, Michigan
Involves objectionable interference to about 5% of the primary daytime service area of Station WHBY, Appleton, Wisconsin	Does not involve objectionable interference to any existing station

D. PRIMARY SERVICE NOW RECEIVED BY EACH AREA DAY AND NIGHT

Muskegon, Michigan	Grand Rapids, Michigan
Daytime: WGN and WMAQ, Chicago, Ill.; WOOD, Grand Rapids, and WKZO, Kalamazoo, Mich.; WTNJ, Milwaukee, Wisconsin	Daytime: WOOD and WLAV, Grand Rapids, Mich.; WJR, Detroit, Mich.; WGN and WMAQ, Chicago, Ill.; WKZO, Kalamazoo, Mich.
Nighttime: WGN and WMAQ. Chicago,, Ill.	Nighttime: WOOD and WLAV, Grand Rapids, Mich.; WJR, Detroit, Mich.; WGN and WMAQ, Chicago, Ill.

From the foregoing, it is manifest that the Fetzer grant does not, as petitioner contends, contravene Section 307(b) of the Communications Act of 1934 and Section 3.24 of the Rules and Regulations of the Commission in so far as these

require the Commission to provide a fair, efficient and equitable distribution of radio service among the several states and communities, since the change in frequency requested by petitioner would if granted, result in a slight increase in service to an area and population which already receives primary service day and night from several stations, and this slight increase in service to the Muskegon area would be offset by the objectionable interference to Station WHBY at Appleton, Wisconsin, by about the same proportion as the increase in nighttime service to the Muskegon station as a result of its operation as proposed; whereas the Fetzer grant will result in the establishment of a new service to a very substantial population which can be instituted without resulting in objectionable interference to any existing service.

Petitioner also contends that it was error for the Commission to grant the Fetzer application because it results in "common ownership of two stations, each of which renders primary service to a substantial portion of the primary service area of the other, contrary to Section 3.35[1] of the Commission's Regulations". This contention is without merit. Although it is true that Station WKZO, Kalamazoo, Michigan, is owned by a Michigan corporation whose controlling stockholders are the applicants for the Grand Rapids station, it is not true that the proposed Grand Rapids station and Station WKZO, Kalamazoo, each "renders service to a substantial portion of the primary service area of the other". In its Public Notice of April 4, 1944, the Commission announced that in determining whether there was such an overlapping in a particular case, it would give consideration to "location of centers of population and distribution of population, location of main studios, areas and populations to which services of stations are directed as indicated by commercial business of stations, news broad-

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[1] Section 3.35 of the Commission's Rules and Regulations provides that:

> "No license shall be granted for a standard broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substantial portion of the primary service area of another standard broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation."

casts, sources of programs and talent, coverage claims and listening audience." The proposed Grand Rapids station, operating on 1230 kc with 250 watts power, approximately 50 miles distant from Kalamazoo, will not render primary service, day or night, to any part of the city of Kalamazoo, Michigan and environs. Because of objectionable interference which the Kalamazoo station receives at night from an existing station, WKZO will not render primary service at night to any portion of the primary service area of the Grand Rapids station, and in the daytime, because of the high noise level in Grand Rapids, WKZO does not render primary service to the business district of Grand Rapids. Moreover, Grand Rapids, which is the second largest business market in Michigan, is a separate and distinct community in a separate and distinct trade area from Kalamazoo, Michigan. In view of these facts, we hold that a grant of the Fetzer application would be consistent with the provisions of Section 3.35 of our Rules and Regulations.

Finally, petitioner alleges that the grant of the Fetzer application denies to it a fair hearing to which it is entitled under Section 309(a) of the Communications Act and that it violates the due process clause of the 5th Amendment to the Constitution of the United States. These allegations are entirely without merit. The Commission has not denied petitioner's application. It has designated the application for hearing as required by Section 309(a) of the Act. At this hearing, petitioner will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944. Such grant does not preclude the Commission, at a later date from taking any action which it may find will serve the public interest. In re: *Berks Broadcasting Company (WEEU)*, Reading Pennsylvania, 8 FCC 427 (1941); In re: *The Evening News Association (WWJ)*, Detroit, Michigan, 8 FCC 552 (1941); In *Merced Broadcasting Company (KYOS)*, Merced, California, 9 FCC 118, 120 (1942).

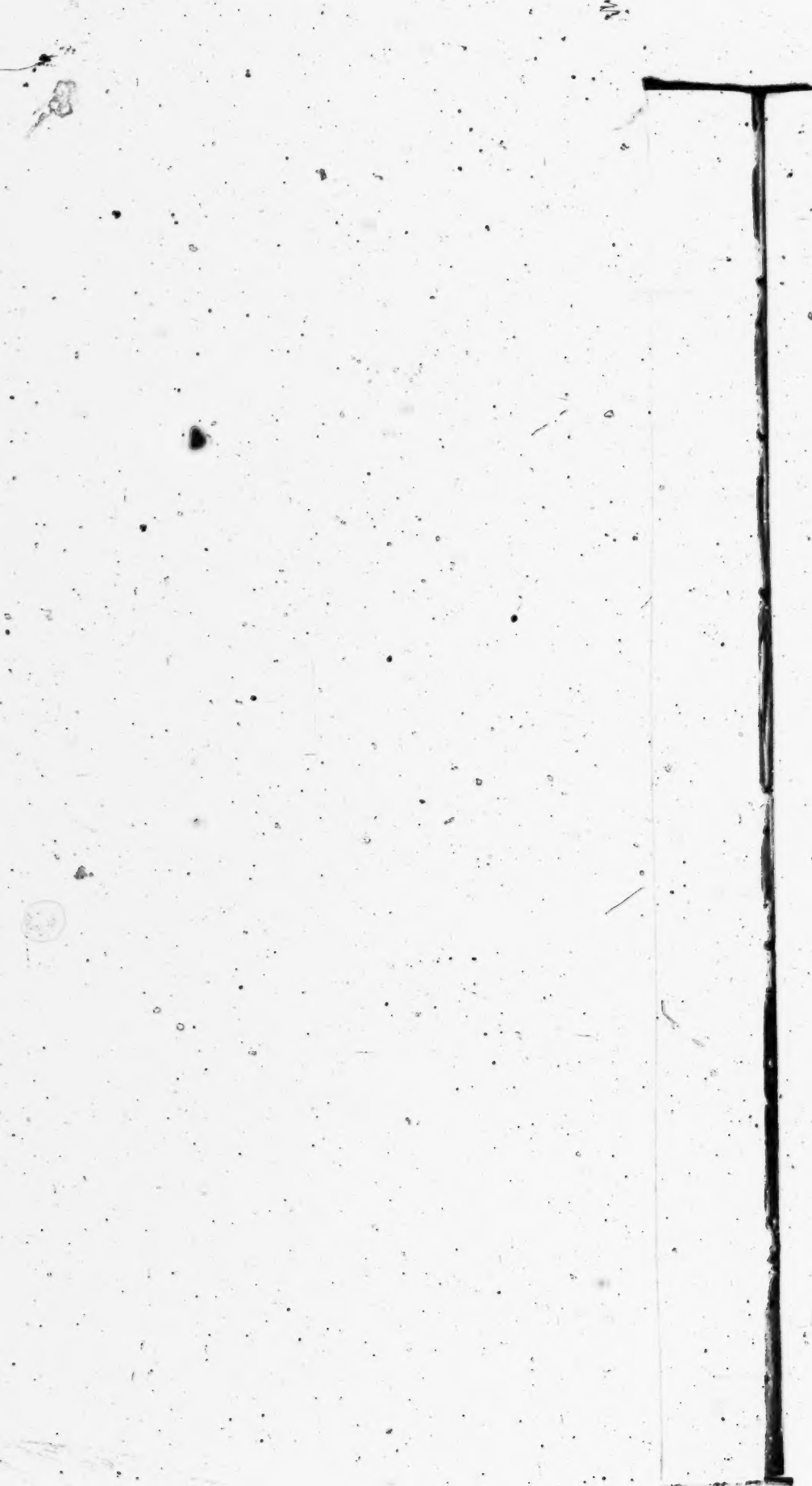
From a careful review of the Ashbacker petition, the applications of Ashbacker Radio Corporation (B2-P-3609) and John E. and Rhea Y. Fetzer (B2-P-3590), and the opposition filed by Fetzer Broadcasting Company to the Ashbacker petition, the Commission finds that no valid reason has been disclosed for setting aside the June 27, 1944 grant to the Fetzer Broadcasting Company. Moreover, no rea-

son appears in the petition why the Fetzer grant, which the Commission has found would be in the public interest, should be stayed pending the filing by the petitioner of a Notice of Appeal in the United States Court of Appeals for the District of Columbia.

Accordingly, IT IS ORDERED, This 12th day of September, 1944, that the petition of Ashbacker Radio Corporation for hearing, rehearing, or other relief, directed against the action of the Commission June 27, 1944, granting the application of John E. Fetzer and Rhea Y. Fetzer, doing business as Fetzer Broadcasting Company, Grand Rapids, Michigan, for construction permit (B2-P-3590), BE, AND IT IS HEREBY, DENIED.

IT IS FURTHER ORDERED, That the request in said petition for stay of the issuance of any construction permit for the use of 1230 kilocycles at Grand Rapids, Michigan, BE, AND IT IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION
T. J. SLOWIE,
Secretary.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 65.

ASHBACKER RADIO CORPORATION, A Michigan Corporation, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE PETITIONER.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

CITATIONS.

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OPINION BELOW.

The action of the Court below was a mere dismissal *per curiam* and there is no opinion (R. 39-40).

JURISDICTION.

The jurisdiction of this Court was invoked by petition for a writ of certiorari under Section 240(a) of the Judicial

Code, as amended by the Act of February 23, 1925, and Section 402(e) of the Communications Act of 1934. The petition was granted May 28, 1945 (R. 41).

INTRODUCTION.

In this brief the petitioner, Ashbacker Radio Corporation, will be referred to as Ashbacker; the respondent, Federal Communications Commission, will be referred to as the Commission.

All statutory and regulatory provisions which are cited in the brief are printed in the Appendix.

STATEMENT OF THE CASE.

Ashbacker is the licensee of WKBZ, the only broadcasting station at Muskegon, Michigan. The frequency assigned WKBZ, 1490 kilocycles, is one of poor propagation characteristics so that Ashbacker is not able to provide a satisfactory service to the entire Muskegon area (R. 9).

A substantial improvement in service can be accomplished by use of the frequency 1230 kilocycles, heretofore available for assignment in the Muskegon area (R. 9).

Accordingly, on April 29, 1944, Ashbacker filed with the Commission an application "for construction permit", dated April 27, 1944, requesting a change in frequency to 1230 kilocycles (R. 1).

This application was in conflict with an application filed March 20, 1944 by the Fetzer Broadcasting Company for a new station to operate at 1230 kilocycles at Grand Rapids, Michigan. It is agreed that the two applications were in conflict and mutually exclusive. It is entirely impossible for the two applicants to use the same frequency and either of them render any service whatsoever (R. 2).

The two applications came jointly before the Commission at a meeting held June 27, 1944. On June 28, 1944, the Commission announced that, without hearing, it had granted the Fetzer application and had "designated for hearing" the Ashbacker application (R. 2).

Ashbacker was without information as to what may have actuated the Commission in this step. Ashbacker believes its application was, in the public interest, superior to the Fetzer application and, had Ashbacker been accorded a hearing upon its application and an opportunity to test, at a public hearing, such claims or representations as were made on behalf of the Fetzer application, Ashbacker would have been able to demonstrate that, in the public interest, its application should have been granted and the Fetzer application denied.

Accordingly, pursuant to Section 405 of the Communications Act of 1934, Ashbacker filed with the Commission a request for hearing, rehearing or other relief. The request recited the foregoing and further pointed out: that the community of Grand Rapids wherein Fetzer was being authorized to construct a new station was already receiving adequate service from two existing stations; that, in addition, station WKZO at Kalamazoo, Michigan, also owned and operated by Fetzer already maintained studios at Grand Rapids and claimed coverage of that community; that the proposed grant to Fetzer violated Section 3.24 of the Rules and Regulations of the Commission in that it provided an additional service to a community already well served, at the expense of the listeners in the vicinity of Muskegon, who do not now have a single primary service; that the grant results in common ownership of two stations, each of which renders a primary service to a substantial percentage of the primary service area of the other, contrary to Section 3.35 of the Commission's regulations. It was argued that the action of the Commission denied Ashbacker the fair hearing to which each applicant is entitled under the Communications Act of 1934 (R. 2, 9-10).

Fetzer filed an opposition to the foregoing petition. The Commission (one Commissioner dissenting and two not participating) on September 12, 1944, published its "Decision and Order on Petition for Hearing, Rehearing and Other Relief", and denied the Ashbacker petition for rehearing (R. 8 ff.).

The decision of the Commission contains elaborate recitals of fact under a heading which begins, "A comparison of important facts relating to the two applications indicates the following: . . .," which facts were obtained and evaluated by the Commission *in camera* without according Ashbacker any opportunity to cross-examine witnesses or to adduce testimony in explanation or rebuttal (R. 8 ff.). The decision of the Commission also alleges:

> ". . . the Commission has not denied petitioner's application. It has designated the application for hearing as required by Section 309(a) of the Act. At this hearing, petitioner will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944" (R. 13).

It is important to observe that many of the "facts" relied upon by the Commission are derived from the pleading filed by Fetzer and there is no evidentiary support for them (R. 10).

While the foregoing petition was pending and before the Commission decision thereon, the Commission, on August 1, 1944, issued and served upon Ashbacker a notice setting up a proposed "hearing" upon its application and prescribing the issues upon which it was proposed to hold the purported hearing. This notice stated that the Ashbacker application would not be granted by the Commission unless the issues specified in the notice were determined in favor of the applicant on the basis of a record duly and properly made by means of a formal hearing. Among the issues thus required to be determined in favor of the applicant was the question whether any interference which would result from the simultaneous operation of the Ashbacker station and the station which the Commission had just authorized for Fetzer (R. 2, 3).

Since it is conceded that Ashbacker and Fetzer cannot use 1230 kilocycles simultaneously without destructive interference, it becomes obvious that the purported hearing

was one in name only and that the grant of the Fetzer application was designed and intended as a denial without hearing of the petitioner's application.

Accordingly, pursuant to Section 402(b)(2) of the Communications Act, Ashbacker filed its notice of appeal to the United States Court of Appeals for the District of Columbia (R. 1 ff.).

On October 27, 1944, the Commission filed a motion to dismiss the appeal on the claim that the Court had no jurisdiction to entertain it (R. 18).

On November 9, 1944, Ashbacker filed its opposition to this motion (R. 32 ff.).

On January 24, 1945, the Court granted the Commission's motion and dismissed the appeal (R. 39-40).

SUMMARY OF ARGUMENT.

I. The action of the Commission which was the subject of the appeal to the Court below had the effect of depriving Ashbacker of the hearing to which it was entitled as a matter of law.

Sections 309(a) and 319(a) of the Communications Act of 1934 require a hearing before an application may be denied. The action of the Commission in considering two mutually-exclusive applications simultaneously, yet granting one and "setting for hearing" the other, makes the purported hearing a nominal one only. This results from the provisions of Section 319(b) that upon completion of construction, the Commission must issue a license (which license runs for three years) and from the provisions of Section 312(a) which provides that a license may be revoked only for specified causes, none of which would be applicable in the present instance. Hence the so-called hearing purportedly accorded to Ashbacker was a hearing wherein the Commission had rendered itself impotent to take favorable action.

II. The action of the Court below in dismissing the appeal deprived Ashbacker of the right of appeal accorded by Section 402(b) of the Communications Act of 1934.

The Court below dismissed the appeal, presumably on the ground urged in the motion to dismiss, namely: that Ashbacker had no appealable interest.

The action of the Commission in making a minute entry purporting to grant a hearing to Ashbacker, while concurrently making a grant of its application impossible, is in law tantamount to a denial of the application and thus brings Ashbacker within the provisions of Section 402(b)(1).

If, however, that section is to be so strictly construed as to apply only to a technical or formal order of denial, then certainly the action of the Commission in granting a mutually-exclusive application, the effect of which is to destroy the Commission's power to grant the Ashbacker application, makes Ashbacker a person aggrieved and whose interests are adversely affected within the provisions of Section 402(b)(2).

ARGUMENT.

Preliminary Statement.

Since this action was taken by order *per curiam*, without opinion, it may be assumed that the Court acted on the allegations and reasoning set up in the Commission's brief in support of its motion to dismiss; namely: that the two applications were mutually exclusive; that the Commission had made a "comparative examination of the two applications" and "found" the grant of the Fetzer application would serve public interest and had hence granted it while setting the petitioner's application for hearing; that the Commission in denying the petitioner's subsequent request for hearing had relied on all "facts" set up in the opinion thereon; that these actions did not constitute a denial of the petitioner's application; that hence the petitioner was not aggrieved or adversely affected within the meaning of

Section 402(b)(2) of the Communications Act; that the results of the petitioner's hearing cannot be foretold; that the Commission might, in future, in some way "modify" the Fetzer license or refuse to renew it,[1] that the petitioner's "opportunity to press its application to the fullest has in no way been impaired by a grant of the competing Fetzer application." (R. 18ff)

Whether or not the Court followed this argument, it did overrule, without opinion, its earlier decision in *Symons Broadcasting Company* v. *Federal Radio Commission* (1933), 62 App. D. C. 46.[2]

If the Court can further be assumed to have ruled that the "hearing" offered the petitioner was a fair hearing, then the Court also overruled, without opinion, its earlier decision in *Chicago Federation of Labor* v. *Federal Radio Commisison* (1930), 59 App. D. C. 333, which imposed a far more heavy burden than proving "public interest, convenience and necessity would be served," in the special case of the applicant who seeks to supplant an existing station.[3]

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[1] As a matter of fact, the Commission issues licenses for three year periods. Section 3.34, Rules and Regulations, FCC.

[2] Wherein it was said, at page 47:

"And in addition to this we think it not untimely to say that in granting and refusing applications for licenses, where two or more stations are applicant for the same frequency, it is the duty of the commission to grant either party asking it a hearing on due notice, for otherwise there is a denial of due process and a substitution in its place of arbitrary power, and that, of course, may not be countenanced."

[3] At page 334 it is said:

"It is not consistent with true public convenience, interest, or necessity, that meritorious stations like WBBM and KFAB should be deprived of broadcasting privileges when once granted to them, which they have at great cost prepared themselves to exercise, unless clear and sound reasons of public policy demand such action. The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced, if the licenses of established stations should arbitrarily be withdrawn from them and appropriated to the use of other stations. This statement does

I. The action of the Federal Communications Commission, which was the subject of the appeal to the Court below, had the effect of depriving Ashbacker of the hearing to which it was entitled as a matter of law.

One who makes application to the Commission for a modification of his license (in this case the applicant was seeking to change from an inferior to a better frequency) is entitled, under Sections 309(a) and 319(a) of the Communications Act, to a public hearing. This has been conceded by the Commission both in its purported opinion (R. 13) and in its brief in the Court below (R. 21, 22).

The difficulty relates, not to the right to a hearing, but to the Commission's rather unusual concept of what a hearing might be.

Much administrative agency activity relates to action upon various applications for licenses, certificates, permits and other similar authorizations. In many of these activities it is possible to act favorably upon unlimited numbers of of such requests. However, in the case of such things as public utility certificates of convenience and necessity and authorizations for airlines and radio stations, situations commonly arise where, because of economic and public service factors, or because of electrical interference, it is impossible or against public interest to grant more than one application for a particular facility.

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not imply any derogation of the controlling rule that all broadcasting privilege are held subject to the reasonable regulatory power of the United States, and that the public convenience, interest, and necessity are the paramount considerations."

To the same effect is *Journal Company* v. *Federal Radio Commission* (1931), 60 App. D. C. 92, 94: "Where a broadcasting station has been constructed and maintained in good faith, it is in the interests of the public and common justice to the owner of the station that its status should not be injuriously affected, *except for compelling reasons.*" (Emphasis supplied.) See also Evangelical Lutheran Synod v. Federal Communications Commission (1939), 70 App. D. C. 270, 272, and Yankee Network, Inc. v. Federal Communications Commission (1939), 71 App. D. C. 11, 22.

These considerations are particularly applicable in the field of radio broadcasting where there is so severe a scarcity of available frequencies.

It is illuminating to consider the Commission's activities in the present case in association with those revealed in *Federal Communications Commission* v. *National Broadcasting Company, et al.* (1943), 319 U. S. 239, and *Federal Communications Commission* v. *Sanders Brothers Radio Station* (1940), 309 U. S. 470, 642.

In the former case it was attempted by the Commission to deprive licensees of their right both to hearing and appeal when threatened with electrical interference. In the latter case, it was attempted to deprive licensees of their right to hearing and appeal when threatened with injury or extinction through competition. In the present case it is being attempted to deprive an applicant of the right to hearing and appeal as against a competing applicant for a facility which can be granted to only one.

Each of the three cases arose out of a recent departure from long-established practices of the Commission. The technique used against Ashbacker is a recently-instituted one.

Until 1939 it was the Commission's established practice to designate conflicting applications for consolidated hearing. The Rules recognized two types of conflict:

(a) *Patent* conflicts, apparent on the face of the application as in this case. Under these circumstances, Sec. 106.4 of the Commission's Rules provided:

> "In fixing dates for hearings the Commission will, so far as practicable, endeavor to fix the same date for hearings on all related matters which involve the same applicant, or arise out of the same complaint or cause; and for hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature, excepting, however, applications filed after any such application has been designated for hearing."

See *Colonial Broadcasters, Inc.*, v. *Federal Communications Commission*, 70 App. D. C. 258.

(b) *Latent* conflicts not readily apparent from the application itself. Under these circumstances, the Commission had its "protest" rule (originally Sec. 45 FRC Rules & Regulations) which provided:

> "45. In any case where an application is granted in whole or in part without a hearing as provided in paragraph 44, any person, firm, or corporation aggrieved or whose interests are adversely affected by such grant, may obtain a hearing upon said application by adhering to the following procedure:
>
> "a. Such parties shall, within 20 days from the date on which public announcement of such grant is made at the principal office of the Commission, or from its effective date if a later date is specified by the Commission, file with the Commission and serve upon or mail to the applicant a protest in writing directed to the action of the Commission making such grant.
>
> "b. . . . .
>
> "c. Upon receipt by the Commission of such protest the application involved will be set for hearing in the same manner in which other applications are set for hearing and the applicant and other parties in interest notified thereof: *provided, however,* That upon such hearing the verified protest shall be taken as a pleading limiting the issues to be tried, but not as evidence of the facts therein stated."

See *Symons Broadcasting Company* v. *Federal Radio Commission*, 62 App. D. C. 46.

Although no changes were made in the statute itself, both these rules were abolished by the Commission in 1939. Since then it has asserted the right, in its discretion, to consolidate conflicting applications for hearing or to conduct unrelated hearings upon them at different times.

And now it goes further and asserts that it has the right to expand this theory into the practice now complained of.

In the present case there were two competing applications. They were considered by the Commission simultaneously (R. 2).

The situation prevailing on June 27, 1944, when the Commission considered these applications, was simply the following: there was one facility to allocate; there were two applications in proper form for that facility; the Commission in closed session undertook to dispose of the controversy by making an outright and unconditional grant to one of the competing applicants; it then undertook to satisfy the rights of the other applicant by making a minute entry that that applicant might have a "hearing."

Otherwise stated, the Commission undertook to interpret the word "hearing" as used in the statute to mean some formal convocation at which perfunctory evidence might be given concerning a license facility no longer available for grant.

Ordinarily the mere statement of the foregoing situation should suffice. The Gilbert and Sullivan arrangements for trial after the beheading bear too close an analogy. But since the Commission has argued its technical position so effectively below, some attention must be given to the reasoning involved.

The Commission contends that it will never lose control over its allocation to Fetzer and hence will be able to grant the Ashbacker application when "heard" if Ashbacker makes a sufficiently persuasive showing.

But this theory evaporates when the actions of the Commission, rather than its words, are studied.

Hearings before the Commission are held upon a document known as a "Notice of Hearing" which itemizes the issues that must be met by the applicant.

In the present case the Commission issued such a Notice. The Notice was served upon Ashbacker. It recited upon its face that the application would be denied unless Ashbacker could by evidence establish that the operation of his station at 1230 kc. would not cause any interference to the

operation of the Fetzer station, which the Commission had already authorized (R. 2, 3). The Commission thereby gave proof that it had no intention whatsoever, at any hearing, of considering the two applications upon a comparative basis. It rather asserts that at the hearing upon the Ashbacker application, it will regard the Fetzer grant as an accomplished fact.

It is difficult to understand how, under these circumstances, the Commission persists in using the word "hearing" to describe so palpably futile a performance.

The Commission's next contention starts from the assumption that the grant to Fetzer, though valid and an accomplished fact, may be revoked after a hearing upon the Ashbacker application.

Since Fetzer proposed an entirely new station, his application comes under Section 319(a) and is for construction permit. Section 319(b) provides that once such a construction permit is granted and the construction is completed the Commission is powerless to withhold a license unless some cause or circumstance arises or first comes to the knowledge of the Commission which would make the operation of the station against the public interest. Nothing of that sort exists in this case. Hence the Commission, if the Fetzer grant is valid, was committed to the issuance of a license. Such license, when issued, ran for the established term of years and during that term may not be tampered with except by order of revocation pursuant to Section 312(a) for certain very specific causes. None of those causes exists in this case and there is not the slightest suggestion anywhere in the record that the Commission might, at any time, even attempt to revoke the Fetzer license.

As regards the suggestion that the Commission might give Ashbacker a fair hearing through refusal to renew the Fetzer license in the future: this is obviously meaningless. There is no predicting what conditions may be at such a future time. The hearing to which an applicant is entitled is a reasonably immediate one under prevailing circumstances.

After Fetzer's station has been in operation for three years, the burden of displacing it upon a comparative showing is insuperable. *Peoria Broadcasting Company and Illinois Broadcasting Company,* 1 F. C. C. 167.

II. The action of the Court below in dismissing the appeal deprived Ashbacker of the right of appeal accorded by Section 402(b) of the Communications Act of 1934.

Section 402(b)(1) grants the right of appeal to any applicant whose application is denied by the Commission.

The foregoing recital of facts indicates that the Ashbacker application has in fact been refused.

However, it is apparently the position of the Commission (just as it has argued that any drumhead "hearing" is a hearing in law), that there cannot be a "refusal" in law unless the Commission chooses to make the physical minute entry refusing an application.

If this be correct, then certainly Ashbacker is protected in its right to appeal by the provisions of Section 402(b) (2), allowing an appeal to any person who is aggrieved or adversely affected by decision of the Commission granting or refusing the application of another.

The action of the Commission granting the Fetzer application and thereby making it impossible to grant the pending Ashbacker application, or even to hold a sincere hearing upon it, is certainly an aggrievement and injury in the legal sense and has on earlier occasion been so recognized by the Commission. *Matter of the Midnight Sun Broadcasting Company,* 6 F. C. C. 319.

CONCLUSION.

It is apropos to quote from the decision of the Commission *In The Matter of Powel Crosley Jr., et al.* (September, 1945, Mim. 84571).

> "While an administrative agency is not bound by the doctrine of *stare decisis* we believe that sound public administration demands respect for established

policies. We believe that any change in policy as fundamental as the one advocated by the minority should, if it is to be effective, be brought about by legislation or by rules and regulations of general applicability. If matters of such importance are left to case-to-case decisions, basic policies can be expected to shift back and forth with changes in membership of the Commission making it impossible for the public to know from one day to the next what the policy is. We believe that administrative agencies such as this Commission have an obligation to adhere to uniform policies, and when developments dictate a change, to adopt after appropriate notice a rule of general application so as to avoid the color of discrimination in a particular case."

Respectfully submitted,

PAUL M. SEGAL,
GEORGE S. SMITH,
PHILIP J. HENNESSEY, JR.,
HAROLD G. COWGILL,
Attorneys for Petitioner.

APPENDIX.

Communications Act of 1934 (48 Stat. 1062, U. S. C. Title 47, Sec. 151 et seq.):

Sec. 309(a). If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Sec. 312(a). Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

Sec. 319(a). No license shall be issued under the authority of this Act for the operation of any station the

construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

Sec. 319(b). Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued contruction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would in the judgment of the Commission, make the opera-

tion of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

Sec. 402(b). An appeal may be taken, in the manner hereafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

Sec. 402(b)(1). By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

Sec. 402(b)(2). By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

Sec. 402(c). At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

Sec. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient rea-

son therefor be made to appear: *Provided, however,* That in the case of a decision, order, or requirement made under Title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order.

Federal Communications Commission Rules and Regulations:

Sec. 3.24. Broadcast facilities; showing required. An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:

(a) That the proposed assignment will tend to effect a fair, efficient, and equitable distribution of radio service among the several states and communities.

(b) That objectionable interference will not be caused to existing stations or that if interference will be caused the need for the proposed service outweighs the need for the service which will be lost by reason of such interference. That the proposed station will not

suffer interference to such an extent that its service would be reduced to an unsatisfactory degree. (For determining objectionable interference, see Engineering Standards of Allocation and Field Intensity Measurements in Allocation.)

(c) That the applicant is financially qualified to construct and operate the proposed station.

(d) That the applicant is legally qualified. That the applicant (or the person or persons in control of an applicant corporation or other organization) is of good character and possesses other qualifications sufficient to provide a satisfactory public service.

(e) That the technical equipment proposed, the location of the transmitter, and other technical phases of operation comply with the regulations governing the same, and the requirements of good engineering practice. (See technical regulations herein and Locations of Transmitters of Standard Broadcast Stations.)

(f) That the facilities sought are subject to assignment as requested under existing international agreements and the Rules and Regulations of the Commission.

(g) That the public interest, convenience, and necessity will be served through the operation under the proposed assignment.

Sec. 3.34. Normal license period. All standard broadcast station licenses will be issued for a normal license period of 3 years. Licenses will be issued to expire at the hour of 3 a. m., Eastern Standard Time, in accordance with the following schedule, and at three-year intervals thereafter: * * *.

Sec. 3.35. Multiple ownership. No license shall be granted for a standard broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substantial portion of the primary service area of another standard broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation.

Judicial Code:

Sec. 240(a). In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 65.

ASHBACKER RADIO CORPORATION, A Michigan Corporation,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

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REPLY BRIEF FOR THE PETITIONER.

PAUL M. SEGAL,
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Attorneys for Petitioner.

October 18, 1945.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR THE PETITIONER.

This reply brief is filed because the Commission in its brief uses two new lines of argument (partially factual in character), suggested neither in the Court below nor in the brief in opposition to the petition for a writ of certiorari.

Neither argument accurately reflects existing facts.

In its brief the Commission, among other arguments, contends [1] that the construction permit given Fetzer is a conditional one and subject to action which may be taken

later as a result of the purported "hearing" to be granted Ashbacker (Br. 15, 20), and [2] that the sustaining by this Court of the Ashbacker contention would impose mechanical and procedural hardships upon the Commission (Br. 13, 20).

I. The grant to Fetzer was not a conditional grant but an absolute one and the Commission reserved no control over it.

The Commission argues that it has imposed conditions in the Fetzer construction permit and license which allow the Commission, in some unspecified way, to recall or "modify" the authorization so as to permit the grant of the Ashbacker application when "heard". This is not so.

When the Commission took its action on June 27, 1944, granting the Fetzer application without a hearing, it took that action unconditionally. It granted a construction permit in ordinary form.

Thereafter Ashbacker filed its request for "rehearing" which the Commission refused. In its refusal the Commission published an opinion arguing a legal philosophy. In that opinion the Commission expressed a view that the *statute* gave it a right to modify the Fetzer construction permit so as to permit the granting of the application of Ashbacker.

The Commission imposed no conditions, nor did it amend or change the construction permit. The Commission actually issued the formal construction permit July 18, 1944. The construction of Fetzer's station was expeditiously accomplished and a formal license for full and unrestricted operation was issued February 8, 1945, during the pendency of the present litigation.

The Commission never intended its discussion of its statutory authority on the Ashbacker petition to constitute a specific condition of the Fetzer grant. The Commission's opinion on Ashbacker's petition for rehearing says merely the following:

"At this hearing, petitioner will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944. Such grant does not preclude the Commission, at a later date from taking any action which it may find will serve the public interest." (R. 13)

Under no circumstances can this be construed as a condition.

Moreover, it has never been suggested by or on behalf of the Commission that any ground has existed for the revocation of the Fetzer construction permit or the Fetzer license. Nor does anyone suggest any kind of modification that can be made. Until now no such modification has been specified and none can be, because, apparently, there is no frequency of the classification here involved which can be assigned to Fetzer. Otherwise this controversy would not have developed.

Nor is the Commission's position improved by the brief's frequent reference to Section 312(b) of the statute, providing that construction permits may, after appropriate order and hearing, be modified by the Commission. The argument is made (although no method is suggested) that the Fetzer license could be modified under this statutory authority.

This is an assumption that Section 312(b) is something that can be invoked by Ashbacker's application as a matter of course. In this regard the authors of the Commission's brief are not in accord with the Commission's rulings upon this subject.

Section 312(b) did not appear in the Radio Act of 1927. Pursuant to that Act the Radio Commission undertook upon a national basis a reallocation of the facilities of a number of stations. One of the stations affected was successful in enjoining the reallocation. As a result, the Commission sought legislation giving it power to initiate reallocations upon a national basis subject to subsequent hearing. It

was as a result of this that Section 312(b) appeared in the 1934 Communications Act.

The Commission outlined the history of this matter in its opinion published May 14, 1935, in *Petition of Universal Broadcasting Corporation*, etc., Docket 2830 (Mimeo. 12998).

That was a case wherein the Missionary Society of St. Paul the Apostle, having a pending application before the Commission, filed a petition asking the reassignment of seven stations so as to improve its own facilities, all pursuant to Section 312(b). In that case, notwithstanding that the petitioner had pending a *bona fide* application to improve its facilities the Commission flatly refused to invoke Section 312(b). It said:

> "It is our judgment that the authority conferred by this Section is important to the regulation of radio. Soon after the decision of the United States Court of Appeals for the District of Columbia in *Charles McK. Saltzman, et al.* v. *Stromberg Carlson Telephone Mfg. Co.*, 60 App. D. C. 31, the Federal Radio Commission urged the adoption by Congress of a provision similar to that now contained in Sec. 312(b). In the regulation of radio and the issuance of licenses for operation on a definitely limited number of frequencies or channels of communication, the exercise of authority such as conferred by Sec. 312(b) is necessary in order to maintain a national scheme of allocation. In the performance of this task the Section will prove beneficial. But in a case which, *upon its face*, does not appear to be materially different than other applications received and considered from time to time, we see no general public necessity for invoking the important authority conferred by the statute.
>
> "It is one thing for the Commission, standing in the relation of *parens patriae*, to negotiate a new allocation under authority expressly delegated by the Act; it is quite another for an individual station, having a personal pecuniary interest in requesting a reallocation involving a number of other stations, to shift the burden which it should bear in showing the necessity

for these changes to the stations to be affected. While any person or applicant may bring to the attention of the Commission such requests as may convince the Commission that a tentative order should be made in the public interest, modifying or changing the allocation to certain stations, and while the Commission may, on its own initiative and without such a suggestion so proceed, nevertheless, when the Commission does enter the order it represents the Commission's initiative and best judgment at the time. The Commission has tentatively spoken and made the statutory finding. The burden of convincing the Commission otherwise would then be upon the several stations affected. This procedure should not be adopted under circumstances such as presented in the instant case."

It is plain that something substantially more than the mere Ashbacker application will be required to induce the Commission to bring Fetzer before it under Section 312(b).

As a matter of fact, the section has never been invoked in the entire history of the Communications Act of 1934; none of the nine printed volumes of reports or the hundreds of mimeographed decisions of the Commission reveals any instance of the use of Section 312(b) in the manner suggested in the Commission's brief.

Fetzer's station is now operating under license as a going concern. The Ashbacker application cannot be granted so long as the Fetzer station exists. That existence cannot be terminated except by revocation. There are no grounds for revocation.

Fetzer's recognizes this and has pointed out its situation in the Court below (R. 29).

Notwithstanding anything contained in its brief, the Commission also recognizes this factual situation. The record shows that the Commission has specifically notified Ashbacker that its application will not be granted pursuant to any hearing unless Ashbacker can show that its proposed operation will not cause interference to Fetzer's existing station (R. 2-3).

Everyone agrees this cannot be done. The difficulty seems to be that the Commission's brief reveals an unwillingness to carry through from facts to conclusions.

The following language from the Commission's decision on Ashbacker's petition for "rehearing" is noteworthy: "Since a grant of the Fetzer application precluded a grant without hearing of the Ashbacker application (B2-P-3609) the Commission on the same day designated the latter application for hearing in accordance with Section 309(a) of the Act." It must be observed that it is the *grant* of the Fetzer application which does the precluding, not whether the grant was accomplished with or without hearing.

II. No administrative or mechanical inconvenience can result from sustaining the petitioner's contentions.

The Commission's brief argues that if the Commission is required to accord a comparative hearing upon simultaneously-considered competitive applications the Commission will be put to inconvenience. The brief makes the claim that the Commission would be handicapped in the handling of thousands of applications for broadcasting and other authorizations. This is naive. Reference is made in the brief to 1689 applications for standard broadcast stations in one year (p. 13). The fact is that most of these were applications for renewal of license or for authority to change equipment, concerning none of which has there been any controversy from competing applicants. Reference is also made to thousands of applications for aviation, police and other services (p. 13). These are almost unanimously non-competitive.

In the broadcast field the Commission has generally followed the practice of holding competitive hearings, pursuant to instructions it has several times received from the Court of Appeals, and has suffered no inconvenience. Even the current practice is to accord such hearing in the usual case. As recently as September 18, 1945, in *Mississippi Broadcasting Company, Inc.*, Docket 6659 (reprinted in the

Appendix) the Commission's opinion takes this practice for granted. No inconvenience has ever resulted and it has been possible to dispose of the hearing calendar as promptly as the Commission has wished.

As concerns nonbroadcasting services, the Commission has uniformly held hearings on competitive applications over the years. Cf. *Intercity Radio Telegraph Co.* v. *Federal Radio Commission*, 60 App. D. C. 21.

Some reference is made in the brief to impending developments in what is known as FM broadcasting and the argument is made that the requirement for holding hearings upon competing applications would impede the construction of some 2,000 FM stations during the next five years, particularly in such cities as New York and Philadelphia (p. 20). The Commission has impaired the validity of this argument by holding a hearing upon the New York assignments on Monday of this week. *Broadcasting and Broadcast Advertising*, October 15, 1945, p. 18.

It is true that action upon 2000 applications, without any hearing upon those which conflict, might afford some opportunity for unsupervised favoritism, but it is not true that holding hearings upon the few applications which are admittedly competitive is a procedure less to be preferred than that resorted to here. In the present case, the Commission's brief relies upon alleged facts taken from data submitted *in camera* after the Commission had in fact granted Fetzer's application.

The Commission justifies this procedure in its brief at pages 21-22 by saying:

> "The Commission is not an uninformed body, wholly dependent upon the data which may be supplied to it by applicants. On the contrary, as is well known, it possesses extensive knowledge of conditions in the broadcasting industry. By means of that knowledge and of the services of an expert staff, it is able to exercise an informed initial judgment upon applications. Its methods, therefore, provide assurance of fairness which may not be ignored and which justifies

> Commission action in numerous instances in which the testimonial processes of a hearing are not employed."

In fact the Commission's brief goes so far as to state:

> "Frequently the Commission is able to determine from examining an application that it is meritorious and from examining a competing application that *it is extremely unlikely to prevail . . .*." (Italics supplied.)

Restated, this is a blunt declaration that the Commission requires no help and wants no interference from the applicants upon whose rights the Commission is to pass. The Commission overlooks the fact that it is *not a source* of power but is expected to exercise a delegated power under constitutional and statutory safeguards, not the least of which is the requirement for fair and open hearings.

Nor is there any problem concerning what are referred to in the brief as "strike" applications. Presumably a "strike" application is an application filed without sincere purpose, merely to prevent action on the application of another. In an industry as closely regulated as broadcasting, the licensee would be rare indeed who would jeopardize his future existence through any type of insincere or improper application. Counsel recall no instance in all the published decisions of the Commission of any application handled by the Commission and identified as a "strike" application.

Respectfully submitted,

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HAROLD G. COWGILL,
Attorneys for Petitioner.

APPENDIX.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.
Docket No. 6659
File No. B3-P-3612
In re Application of
MISSISSIPPI BROADCASTING COMPANY, INC. (NEW)
MACON, MISSISSIPPI
For Construction Permit

MEMORANDUM OPINION

By the Commission:

This is an application (filed May 8, 1944) of the Mississippi Broadcasting Company, Inc., for a construction permit for a new standard broadcast station at Macon, Mississippi, to operate on the frequency 1400 kc. with power of 250 watts, unlimited time, site to be determined.

The application as originally filed requested the frequency 1240 kc and **involved a question of possible interference with a conflicting application of Birney Imes, Jr., for a new station at Meridian, Miss., also requesting the frequency 1240 kc. The instant application was, therefore, designated for hearing, which was held in a consolidated proceeding** with the Imes application on November 17, 18, and December 1, 1944. Subsequently, the Mississippi Broadcasting Company, Inc., filed a motion to amend its application to request the use of the frequency 1400 kc (instead of 1240 kc) with power of 250 watts, unlimited time, and the removal of its application from the hearing docket; which motion was granted on January 23, 1945. Thereafter, on June 8, 1945, the applicant petitioned for immediate processing of its application, as amended, providing that the same be considered under the Commission's Supplemental Statement of Policy of January 25, 1945.

The operation of the proposed station on the frequency 1400 kc involves no questions **of interference** with any existing or **proposed broadcast stations.**

The applicant has submitted information indicating that all of the equipment necessary to effect the proposed construction and operation is available with the exception of a modulation monitor.

It appears that Macon, Mississippi, with a population of 2,261 persons (1940 U. S. Census) has no station at the present time. There is no primary service available to this community from existing stations during either the daytime or nighttime hours, nor to any of the proposed nighttime service area. Only a very slight amount of daytime service is available to the proposed daytime rural service area. This is rendered by Station WCBI, Columbus, Miss., 28 miles distant (operating on 1340 kc, 250 watts, unlimited time), affiliated with the Mutual Broadcasting System. Operating as proposed, the applicant estimates that it would render primary service to a nighttime population of approximately 2,820 persons and to a daytime population of 20,187 persons. The applicant represents that the proposed station would provide a wholly local program service without network affiliations. Statements from persons and organizations in Macon, Mississippi, which were submitted with the application, indicate that the proposed station is actively supported by representative community groups.

It appears from the foregoing that the application substantially meets the requirements of the Commission's January 25, 1945, Supplemental Statement of Policy. In its Statement of Policy of August 7, 1945, the Commission announced, among other things, that it would continue to act upon applications that have not heretofore been affected by the "freeze" policy, e.g., new stations in communities without primary service.

Upon consideration of the entire matter, the Commission finds that the granting of the application will serve public interest, convenience, and necessity.

IT IS THEREFORE ORDERED, This 18th day of September, 1945, that the application of the Mississippi Broadcasting Company, Inc., for construction permit BE, AND IT IS HEREBY, GRANTED, subject to the condition that the applicant will be required to install a modulation monitor of an approved type, as required by Section 3.55(b) of the Commission's Rules and Regulations, as soon as this product is available on the market.

T. J. SLOWIE,
Secretary.

(Emphasis supplied.)

ACKNOWLEDGMENT OF SERVICE.

Receipt is acknowledged of 5 copies of the Reply Brief for the Petitioner in No. 65, *Ashbacker Radio Corporation* v. *Federal Communications Commission*, this 18th day of October, 1945.

.....

Solicitor General of the United States.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 65.

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v.

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SUPPLEMENT TO REPLY BRIEF FOR THE PETITIONER.

PAUL M. SEGAL,
GEORGE S. SMITH,
PHILIP J. HENNESSEY, JR.,
HAROLD G. COWGILL,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ASHBACKER RADIO CORPORATION, A Michigan Corporation, *Petitioner*,

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

SUPPLEMENT TO REPLY BRIEF FOR THE PETITIONER.

The brief for the Federal Communications Commission in this case was filed October 15, 1945.

Thereafter, on October 18, 1945, the petitioner filed a reply brief.

This case was not called for oral argument as early as had been expected during preparation of the reply brief and has gone over for a short period.

During that interval the Commission has published several announcements of its actions which repudiate one of the strongly-urged arguments of its brief. That brief argues, notably at pages 13, 20 and 21, that hardship and delay would result if the Commission is required to accord comparative hearings upon simultaneously-considered competitive applications. Also, the brief omits to mention that with the exception of the present application of Ashbacker and a few other isolated applications, it is the uniform practice of the Commission to accord hearings upon simultaneously-considered competitive applications.

After the filing of the briefs, the Commission, on October 18th, announced in its supplement to Report No. 723 (which supplement is reprinted as Appendix A) that it had adopted an order setting aside the grant of an application from Norwich, Connecticut, because the Commission had now been informed that the application (which it had granted without hearing) involved a possible conflict with another application for the same frequency from Waterbury, Connecticut.

Again, on October 25, 1945, the Commission designated for hearing 231 applications for new stations or changes in assignment because of (a) obvious problems of objectionable interference, and (b) conflicts with other applications for the same or similar facilities. The Commission's announcement (10 F. R. 13458, reprinted as Appendix B) states that petitions are invited from applicants who believe that the granting of any of the applications involved in the hearings might adversely affect their existing or proposed broadcast services due to the possibility of objectionable interference. The announcement goes so far as to fix consolidated hearings upon applications which have not yet been heard along with applications upon which hearing records have in fact been closed.

The effect of the announcement is to ratify and repeat the Commission's well-established policy discussed in the principal briefs; it brings the Commission's conduct in the

present case within the condemnation of this Court in *Yick Wo* v. *Hopkins*, 118 U. S. 356.

Respectfully submitted,

PAUL M. SEGAL,
GEORGE S. SMITH,
PHILIP J. HENNESSEY, JR.,
HAROLD G. COWGILL,
Attorneys for Petitioner.

ACKNOWLEDGMENT OF SERVICE.

Receipt is acknowledged of five copies of the Supplemental Reply Brief for the Petitioner in No. 65, *Ashbacker Radio Corporation* v. *Federal Communications Commission*, this 8th day of November, 1945.

Solicitor General of the United States

APPENDIX A.

PUBLIC NOTICE
85623
October 18, 1945.

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

BROADCAST ACTIONS BY THE COMMISSION

Supplement to Report No. 723—(BROADCAST)

The Commission en banc on October 17 took the following action:

WQXQ	Interstate Broadcasting Co. Inc. New York City.	Granted request to operate FM station WQXQ only one hour rather than three hours between 6 a.m. and 6 p.m. for a period ending no later than December 31, 1945. In the meantime, the station will continue to broadcast in accordance with its present operating schedule of seven hours daily.
Norwich Broadcasting Co., a Partnership composed of H. Ross Perkins and J. Eric Williams, Norwich, Conn.		**Adopted an Order setting aside grant of October 9, 1945, of application for new station to operate on 1240 kilocycles with 250 watts power, unlimited time, because of possible conflict with application filed prior to October 8, 1945.**

APPENDIX B.

PUBLIC NOTICE
85926
October 25, 1945.

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

On October 23, 1945, the Commission designated for hearing a total of 231 applications for (1) new standard broadcast stations in various localities in the United States and (2) changes in assignments of existing broadcast stations. These consolidated groups involve a total of 61 hearings. These applications were consolidated because of obvious problems of objectionable interference.

Due to the unprecedented number of applications now pending, in consolidating the various groups it was not possible in every instance for the Commission to determine the interference which may be expected with existing broadcast services or marginal problems of interference with other applications for proposed stations. In some cases, therefore, specific issues covering such problems will not be included among the other issues upon which notices of hearing are to be promulgated. Therefore, if any licensee or applicants believe that the granting of any of the applications involved in these hearings would adversely affect their existing or proposed broadcast services due to the probability of objectionable interference, such parties may file petitions requesting intervention and the enlargement of the issues in such hearings, supported by appropriate engineering studies to show such objectionable interference, as defined by the Commission's Standards of Good Engineering Practice. All such petitions will be given careful consideration by the Commission.

The applications involved in the above action of the Commission are as follows:

Star Broadcasting Co. Inc. (B1-P-3979), Geneva, New York; for new station on 1240 kc, 250 watts, Unlimited. To be consolidated with the following: The Finger Lakes Broadcasting System (Docket No. 6604), Geneva, N. Y.; WARC, Inc. (Docket 6605), Rochester, N. Y.; Rochester Broadcasting Corp. (Docket 6606), Rochester, N. Y.;

Seneca Broadcasting Corp. (Docket No. 6607), Rochester, N. Y.

Tennessee Radio Corp., Nashville, Tenn., for reinstatement of application (Docket 6193) for new station on 1240 kc, 250 watts, U.; Murfreesboro Broadcasting Service, Murfreesboro, Tenn., for new station on 1240 kc, 250 watts, Unlimited time. To be consolidated with: Nashville Radio Corp. (Docket 6108); Capitol Broadcasting Co. (Docket 6669), both for new stations at Nashville, on 1450 kc. Tennessee Broadcasters (Docket 6648); J. W. Birdwell (Docket 6649). All for new stations at Nashville on 1240 kc.

Donald Flamm (B1-P-4056); The Metropolitan Broadcasting Service, both for new stations at New York, N. Y., on 620 kc, 5 KW, U.; WAGE, Inc. (WAGE), Syracuse, N. Y., 620 kc, 5 KW, Unlimited time, DA; WCAX Broadcasting Corp. (WCAX) (B1-P-3961), Burlington, Vt., 620 kc, 5 KW, U; DA. To be consolidated with: Newark Broadcasting Corp. (Docket 6190), Newark, N. J., for a new station on 620 kc, 5 KW; U.

Copper City Broadcasting Corp. (Docket 6744), to be consolidated with: Utica Broadcasting Co. Inc. (Docket 6140); Ronald B. Woodyard (Docket 6683); Utica Observer Dispatch, Inc. (Docket 6043); Midstate Radio Corp. (Docket 6141). The application of Copper City Broadcasting Corp. is for a new station at Rome, N. Y., on 1450 kc, 250 watts, Unlimited. The remaining four applications are for new stations at Utica, N. Y., for 1450 kc, 250 watts.

Northern Broadcasting Co. Inc., (WSAU) (B4-P-3656), Wausau, Wis., for construction permit to change frequency to 1250 kc; Midwest Broadcasting Co. (B4-P-3746), Milwaukee, Wis., for a new station on 1250 kc with 5 KW. Farnsworth Television & Radio Corp. (WGL), Ft. Wayne, Ind., to change frequency to 1250 kc and increase power to 1 KW. Virginia-Carolina Broadcasting Corp., for a new station on 1250 kc, 1 KW night, 5 KW-LS, Danville, Va., to be consolidated with: The Wren Broadcasting Co. (WREN) (Docket 6703), which requests permission to move from Lawrence to Topeka and increase power on 1250 kc, to 5 KW.

Chronicle Publishing Co. Inc., Marion, Indiana, for new station on 1230 kc, 250 watts, Unlimited; Booth Radio Stations, Inc., Logansport, Ind. for new station on 1230 kc, 100 watts, Unlimited, to be consolidated with: Voice of

Marion, (Docket 6773) for a new station at Marion, Ind., on 1230 kc, 250 watts.

Tri-County Broadcasting Corp., (B5-P-3890) and Edisto Broadcasting Co., both for new stations in Orangeburg, South Carolina, on 1450 kc, 250 watts, Unlimited time, to be consolidated with: Observer Radio Corp. (Docket 6763) and Orangeburg Broadcasting Corp. (Docket 6764), both requesting identical facilities.

The Constitution Publishing Co. (formerly Constitution Broadcasting Co. Docket 6075), Atlanta, Ga., New Mexico Publishing Co. (B5-P-3932), Santa Fe, New Mexico; Shenandoah Valley Broadcasting Corp. (WSVA) (B2-P-3753), Harrisonburg, Va.; Booth Radio Stations, Inc., Saginaw, Mich.; Federated Publications, Inc. (B2-P-4010), Lansing, Mich.; WJIM, Inc., Lansing, Mich.; Montana Broadcasting and Television Co., Anaconda, Mont., Pulitzer Publishing C. (KSD), St. Louis, Mo.; Caprock Broadcasting Co., Lubbock, Texas, to be consolidated with: Radiophone Broadcasting Station WOPI, Inc. (WOPI), (Docket 6661), Bristol, Tenn. All of these applicants, request the use of frequency 550 kc.

San Bernardino Broadcasting Co. Inc., San Bernardino, Cal., (B5-P-3908); Lee Bros. Broadcasting Co. (KFXM), San Bernardino; Nevada Radio & Television Co. (B5-P-3832), Reno, Nev., New Mexico Broadcasting Co., (KGGM) (B5-P-2918), Albuquerque, New Mexico; The Star Broadcasting Co. Inc., Pueblo, Colo., to be consolidated with: Southern Utah Broadcasting Co. (KSUB) (Docket 6759), Cedar City, Utah. All of these applicants request authority to operate on 590 kc.

Atlantic Broadcasting Co. (B3-P-3835); Chatham Broadcasting Co. (B3-P-4029), both for new stations at Savannah, Ga., to operate on 1400 kc, 250 watts, Unlimited time, to be consolidated with: A. C. Neff (Docket 6640), seeking identical facilities.

Fayette Associates, Inc. (B2-P-3876), for a new station at Montgomery, W. Va., to operate on 1400 kc, 250 watts, Unlimited time, to be consolidated with: Joe L. Smith, Jr. (Docket 6677), for a new station at Charleston, W. Va., 1400 kc, 250 watts, Unlimited time.

Thomaston Broadcasting Co. (B3-P-3829), Thomaston, Ga., 1420 kc, 250 watts, U.; J. W. Woodruff, Jr., and E. B. Cartlidge, Jr. d/b as Columbus Broadcasting Co. (WRBL)

(B3-P-3986), Columbus, Ga., 1420 kc, 5 KW, U.; Muscogee Broadcasting Co., Columbus, Ga., 1450 kc, 250 watts; Chattahoochee Broadcasting Co., Columbus, Ga., 1460 kc, 1 KW; A. Frank Katzentine (Docket 6705), Orlando, Fla., 1420 kc, 5 KW, U.; Palm Beach Broadcasting Corp. (WWPG), (B3-P-3968), Palm Beach, Fla., 1420 kc, 1 KW U. To be consolidated with: City of Sebring, Fla. (Docket 6696), Sebring, Fla., 1430 kc, 1 KW U.

Sabine Area Broadcasting Corp. (B3-P-4011), Orange, Texas; WOOP, Inc. (B2-P-3987), Dayton, Ohio; Charlotte Broadcasting Co. (B3-P-3847), Charlotte, N. C.; Burlington-Graham Broadcasting Co. (B3-P-4026), Burlington, N. C.; McClatchy Broadcasting Co. (B5-P-3800), Modesto, Cal.; United Broadcasting Co. Inc. (B3-P-3965), Montgomery, Ala.; Roy A. Lundquist & D. G. Wilde (B5-P-4050), copartners d/b as The Skagit Valley Broadcasting Co., Mount Vernon, Wash.; Gazette Co., Cedar Rapids, Iowa; Long Island Broadcasting Corp. (WWRL), Woodside, N. Y., James F. Hopkins, Inc. (Docket 6230), Ann Arbor, Mich.; San Juaquin Broadcasters, Inc., Modesto, Cal.; Piedmont Carolina Broadcasting Co. Inc., Reidsville, N. C.; These applications involve the use of channel 1600 kc, and are to be consolidated with: Capital City Broadcasting Co. (Docket 6711), Des Moines, Iowa; Capitol Radio Corp. (Docket 6712), Des Moines; Myron E. Kluge, Earle E. Williams and C. Harvey Haas a partnership, d/b as Valley Broadcasting Co., Pomona, Cal. (Docket 6633).

Arkansas-Oklahoma Broadcasting Corp. (B3-P-4034); Donald W. Reynolds (B3-P-3772), both seek new stations at Fort Smith, Ark., on 1230 kc, 250 watts, unlimited time.

James H. McKee (B2-P-3738); Capitol Broadcasting Corp. (B2-P-3779); Chemical City Broadcasting Co. (B2-P-3841), all request new stations at Charleston, W. Va., to operate on 1240 kc, 250 watts, unlimited time.

Coast Ventura Co. (B5-P-3725); Ventura Broadcasters, Inc. (B5-P-3807), both request new stations at Ventura, Cal. to operate on 1450 kc, 250 watts, Unlimited time.

Huntington Broadcasting Corp. (B2-P-3741), Greater Huntington Radio Corp. (B2-P-3826), both for new stations at Huntington, W. Va., 1450 kc, 250 watts, unlimited time.

Bay State Beacon, Inc. (B1-P-3983); Mitchell G. Meyers, Reuben E. Aronheim and Milton H. Meyers (B1-P-3819); Cur-Nan Co.; Templeton Radio Mfg. Corp. The first three applicants request new stations at Brockton, Mass., 1450 kc,

250 watts, unlimited; the fourth requests a new station at Boston, Mass., 1450 kc, 250 watts, Unlimited.

Bradford and Pihl (B4-P-3956); Russell E. Kaliher; both applicants request stations at Bemidji, Minn., 1450 kc, 250 watts, unlimited.

Escombia Broadcasting Co. (B3-P-3842); Gulfport Broadcasting Co. Inc.; Pape Broadcasting Co., all seek new stations at Pensacola, Fla., on 1450 kc, 250 watts, unlimited.

Glens Falls Broadcasting Corp. (Docket 6702); Great Northern Radio, Inc. (B1-P-4104); Glens Falls Publicity Corp. These applicants all seek stations at Glens Falls, N. Y., to operate on 1450 kc, 250 watts, Unlimited time.

Bernard Lee Blum, Waterbury, Conn.; Mitchell G. Meyers, Ruben E. Aronheim, and Milton H. Meyers, Waterbury, Conn.; Harold Thomas, Waterbury, Conn. (B1-P-3951); Associated Electronic Enterprises, Woonsocket, R. I.; H. Ross Perkins and J. Eric Williams, d/b as Norwich Broadcasting Co. (B1-P-3870), Norwich, Conn. These five applicants request stations respectively at Waterbury, Conn.; Norwich, Conn., and Woonsocket, R. I., all to operate on frequency 1240 kc.

Valley Broadcasting Association, Inc. (B3-P-3759), McAllen, Texas; Howard W. Davis, (B3-P-3830), McAllen, Texas; Radio Station KEEW, Ltd, (KEEW), Brownsville, Texas; Red River Valley Broadcasting Corp. (KRRV), Sherman, Texas. All four applicants request authority to operate on frequency 910 kc.

Valdosta Broadcasting Co., Valdosta, Ga.; Hazlewood, Inc. (WLOF) (B3-P-3973), Orlando, Fla. Both applicants request authority to operate on 950 kc.

Radio Service Corp. (KSEI) (B5-P-3735), Pocatello, Idaho, for increase in power on 930 kc to 5 KW, U:; Vancouver Radio Corp. (KVAN) (B5-P-3552), Vancouver, Wash., to change frequency from 910 to 930 kc, and increase power to 1 KW, Unlimited time.

Penn Thomas Watson (WGTM) (B3-P-3848), Wilson, N. C.; Eastern Carolina Broadcasting Co. (WGBR) (B3-P-3914); Goldsboro, N. C.; Jonas Weiland (WFTC), (B3-P-3827), Kinston, N. C.; Roanoke Broadcasting Corp. (WSLS), Roanoke, Va.; Lynchburg Broadcasting Corp. (WLVA), Lynchburg, Va. All these applicants request use of frequency 590 kc.

Voice of Augusta, Inc. (B3-P-3919); The Augusta Chronicle Broadcasting Co.; Savannah Valley Broadcasting Co.

All these are applicants for a new station at Savannah, Ga., to operate on 1340 kc, 250 watts, Unlimited time.

El Paso Broadcasting Co.; Bleecker P. Seaman and Carr P. Collins, Jr., d/b as Seaman and Collins. These two are applicants for a new station at El Paso, Texas, on 1340 kc, 250 watts, Unlimited.

Broadcasting Corp. of America, Indo, Calif.; Richard T. Sampson, Banning, Cal. These two are for new stations at Indo and Banning, Cal., to operate on 1400 kc, 250 watts, unlimited time.

Radio Sales Corp., Twin Falls, Idaho; Jessica L. Longston, Burley, Idaho. These are applicants for new stations at Twin Falls and Burley, Idaho, both to operate on 1450 kc, 250 watts, Unlimited.

C. L. Pursley and Louise Patterson Pursley, d/b as Pursley Broadcasting Service (B3-P-3745);

H. O. Jones, Wm. E. Jones, and James O. Jones, a copartnership, d/b as WGCM Broadcasting Co. (B3-P-3698); WLOX Broadcasting Co. The first application is for new stations at Mobile, Ala., to operate on 1490 kc, and the last two are applicants for Biloxi, Miss., to operate on 1490 kc.

Crescent Broadcasting Corp., Shenandoah, Pa.; The Patriot Co., Harrisburg, Pa. These are applicants for stations at Shenandoah and Harrisburg, Pa., both request the frequency 580 kc.

KOVO Broadcasting Co. (KOVO), Provo, Utah, (Docket 6739), to change frequency to 960 kc, and increase power to 1 KW.; United Broadcasting Co., for a new station at Ogden, Utah, on 950 kc, 250 watts, Unlimited time; both applicants request frequency 960 kc.

Peninsula Broadcasting Co. (WBOC) (B1-P-3786); Eastern Shore Broadcasting Co. (B1-P-3751). The former requests 1 KW, unlimited time, on 960 kc, at Salisbury, Md., and the latter requests 500 watts day, on the same frequency at Preston, Md.

Cedar Rapids Broadcasting Corp. Inc. (B4-P-3970); Radio Corp. of Cedar Rapids; Muscatine Broadcasting Co., Moline Dispatch Publishing Co. The first two applicants request new stations at Cedar Rapids, Iowa, to operate on 1450 kc, 250 watts, Unlimited time; Muscatine Broadcasting Co. requests a new station at Muscatine, Iowa, to operate on 1450 kc. Moline Dispatch Publishing Co. requests a new station at Moline, Ill., to operate on 1450 kc.

John L. Plummer (B3-P-3798); J. O. Emmerich (B3-P-3805), Iddo K. Corkern (B3-P-4033). These three applicants seek a new station at Bogalusa, La., to operate on 1490 kc, 250 watts, unlimited time.

Murray L. Grossman, tr/as The Danbury Broadcasting Co. (G1-P-4017); The Berkshire Broadcasting Corp.; Torrington Broadcasting, Inc. The first two applicants request a new station at Danbury, Conn., the third is for a new station at Torrington, Conn., to operate on 1490 kc, 250 watts, unlimited time; the third for the same frequency at Torrington, Conn.

Meadville Tribune Broadcasting Co.; H. C. Winslow; Times Publishing Co. (B2-P-3773). The first two applications are for new stations at Meadville, Pa., on 1490 kc, 250 watts, unliimited time. The third for a new station at Erie, Pa., on 1490 kc, 250 watts, unlimited time.

Roderick T. Peacock, Sr. tr/as Daytona Beach Broadcasting Co.; Wade R. Sperry, Edgar J. Sperry and Josephine T. Sperry, a co-partnership, d/b as Daytona Beach Broadcasting Co. Both applications are for a new station at Daytona Beach, Fla., on 1340 kc, 250 watts, unlimited time.

Old Pueblo Broadcasting Co.; Sun County Broadcasting Co., applicants for a new station at Tucson, Ariz., to operate on 1340 kc, 250 watts, unlimited time.

Smoky Mountain Broadcasting Co. (B3-P-3777); Clarence Beaman, Jr. tr/as East Tennessee Broadcasting Co. Both are applicants for a new station at Knoxville, Tenn. to operate on 1340 kc, 250 watts, Unlimited time.

Peterson & Co. (B2-P-3984); The Central Kentucky Broadcasting Co.; Garvice D. Kincaid. All three are applicants for a new station at Lexington, Ky., to operate on 1340 kc, 250 watts, unlimited time.

Central Broadcasting Corp.; Howard W. Davis, t r as The Wahmac Co. Both are applicants for a new station at Corpus Christi, Texas, to operate on 1230 kc, 250 watts, unlimited time.

Syracuse Broadcasting Corp. (New), Syracuse, N. Y.; WLEU Broadcasting Corp. (WLEU), Erie, Pa. Both applicants seek the use of frequency 1260 kc.

Kentucky Broadcasting Co., Lexington, Ky.; P. C. Wilson, Canton, Ohio; Cleveland Broadcasting Co. Inc. (B2-P-4058), Cleveland, Ohio; Scripps-Howard Radio, Cleveland, Ohio; Walter A. Graham (B3-P-4059), Tipton, Ga. All five

applications are for new stations in the communities listed, and all seek the use of frequency 1300 kc.

Edgar T. Bell (B4-P-3812) (New), Peoria, Ill., 1350 kc, 1 KW, U; Central Ill. Radio Corp. (B4-P-3911) (New), Peoria, Ill., 1340 kc, 250 watts, U.; WJPS, Inc. (B4-P-3923) (New), Evansville, Ind., 1330 kc, 1 KW, U; Tri-State Broadcasting Corp. (New), Evansville, Ind., 1330 kc, 5 KW, U.; Booth Radio Stations, Inc. (New), Flint, Mich., 1330 kc, 1 KW, U.; Wabash Valley Broadcasting Corp. Terre Haute, Ind., 1350 kc, 5 KW, U.

Beaver County Broadcasting Corp. (New), Beaver Falls, Pa.; McKeesport Radio Co., McKeesport, Pa., Booth Radio Stations, Inc., Lansing, Mich. All three applicants request use of frequency 1360 kc.

F. M. Radio and Television Corp. (New), San Diego, Cal., 1370 kc, 500 watts night, 1 KW-LS, U.; Broadcasters, Inc. (New), San Jose, Cal., 1370 kc, 1 KW U; United Broadcasting Co. (B5-P-4061), San Jose, Cal., 1380 kc, 250 watts, U.; DeHaven, Hall and Oates (New), Salinas, Cal., 1380 kc, 1 KW, U.; Valley Broadcasting Co. (B5-P-4015), Stockton, Cal., 1380 kc, 1 KW, U.; Central Cal. Broadcasters, Inc. (KRE) (B5-P-3982), Berkeley, Cal., 1380 kc, 1 KW, U. All six applications are interrelated.

Southern Media Corp. (New), Coral Gables, Fla., Ft. Lauderdale Broadcasting Co. (B3-P-3785), Ft. Lauderdale, Fla. Both applicants request the use of 1400 kc.

Old Dominion Broadcasting Corp. (B2-P-3978), Lynchburg, Va.; Blue Ridge Broadcasting Corp. (B2-P-2917), Roanoke, Va.; Piedmont Broadcasting Corp. (WBTM), Danville, Va., John M. Rivers (WCSC), Charleston, S. C. All four applicants request authority to operate on 1390 kc.

Central Broadcasting Co. (B4-P-3809); Wisconsin State Broadcasting Co. (B4-P-4039). Both applications are for a new station at Madison, Wisc., to operate on 1480 kc.

Permain Basin Broadcasting Co. (B3-P-4022); Wendell Mayes, C. C. Woodson and J. S. McBeath (B3-P-3901) d/b as Odessa Broadcasting Co.; Ben Nedow, t/r as Ector County Broadcasting Co.; Dorrance D. Roderick (B3-P-4038). All four applications are for new stations at Odessa, Texas, to operate on frequency 1450 kc.

Albany Broadcasting Co. Inc. (B1-P-3945), Albany, N. Y.; Fort Orange Broadcasting Co. Inc. (B1-P-4020), Albany, N. Y.; WHEC, Inc. (WHEC) (B1-P-3976), Roches-

ter, N. Y. All three applications request the frequency 1460 kc.

Golden Gate Broadcasting Corp. (KSAN) (B5-P-3913), San Francisco, Calif.; 1460 kc, 1 KW, U.; California Broadcasting, Inc. (B5-P-4076), Bakersfield, Cal., 1460 kc, 1 KW, U.; Bakersfield Broadcasting Co. (New), Bakersfield, Cal., 1490 kc, 250 watts, U.; L. John Miner, Taft R. Wrathall and Grant R. Wrathall, d/b as Monterey Bay Broadcast Co. (New), Santa Cruz, Cal., 1460 kc, 500 watts, U.; Cascade Broadcasting Co. Inc. (KTYW) (B5-P-3889), Yakima, Wash., 1460 kc, 1 KW, U.; Amphlett Printing Co. (B5-P-3912), San Mateo, Cal., 1490 kc, 250 watts, U.; Luther E. Gibson (B5-P-2787), Vallejo, Cal., 1490 kc, 250 watts, U.; San Jose Broadcasting Co. (B5-P-3921), San Jose, Cal., 1500 kc, 1 KW, U. All eight applications are interrelated.

Albert S. Drolich and Robert A. Drolich, d/b as Drolich Bros. (New), Flint, Mich.; Booth Radio Stations, Inc. (New), Grand Rapids, Mich., Methodist Radio Parish, Inc. (B2-P-3836), Flint, Mich. The first two applicants request 1470 kc, and the third requests 1500 kc.

The Chesapeake Radio Corp. (New), Annapolis, Md.; Nied and Stevens (New), Warren, Ohio; Daily Telegraph Printing Co. (WHIS), Bluefield, W. Va. The first two applications request 1440 kc., WHIS increase in power on same frequency.

George A. Ralston and Jerry C. Miller, d/b as Elgin Broadcasting Co. (B4-P-3833), Elgin, Ill.; William L. Klein (New), Oak Park, Ill.; Sidney H. Bliss, t/r as Beloit Broadcasting Co. (New), Beloit, Wis. All three applications request 1490 kc.

Paul D. Spearman, Jackson, Miss.; Chas. H. Russell, W. B. McCarty, T. E. Wright and C. A. Lacy, a Ltd. partnership, d/b as Rebel Broadcasting Co. (B3-P-3755), Jackson, Miss.; Capitol Broadcasting Co. Inc., (WRAL), Raleigh, N. C.; S. E. Adcock, tr/as Stuart Broadcasting Co. (WROL) (B3-P-3616), Knoxville, Tenn.; Virginia Broadcasting Corp. (B2-P-3964), Roanoke, Va.; Wichita Broadcasters (KWFT), Wichita Falls, Texas; Durham Radio Corp. (WDNC) (B3-P-3170); Durham, N. C. All these applicants seek authority to operate on 620 kc.

Scripps-Howard Radio, Inc. (WCPO) (B2-P-3898), Cincinnati, Ohio; Queen City Broadcasting, Inc. (New), Cincinnati, Ohio; American Broadcasting Corp. (WLAP),

Lexington, Ky. All three applications seek authority to operate on 630 kc.

WSAV, Inc. (WSAV) (B3-P-3679), Savannah, Ga.; Atlantic Coast Broadcasting Co. (WTMA) (B3-P-3752), Charleston, S. C. Both stations seek the frequency 630 kc.

Wichita Broadcasting Co., Inc. (B4-P-3747); Air Capital Broadcasting Co. Inc. (B4-P-3769); Wichita Beacon Broadcasting Co. (B4-P-3963); Adelaide Lillian Carrell; KAIR Broadcasting Co. Inc.; KTOP, Inc. (B4-P-3727); Emporia Broadcasting Co. Inc. (KTSW) (B4-3457). The first five applications request new stations at Wichita, Kans., on 1490 kc Station KTSW requests a change of frequency from 1400 to 1490 kc; KTOP, Inc., requests 1400 kc, contingent upon a grant of the application of KTSW from 1400 to 1490 kc.

No. 1196

In the Supreme Court of the United States

OCTOBER TERM, 1944

ASHBACKER RADIO CORPORATION, A MICHIGAN CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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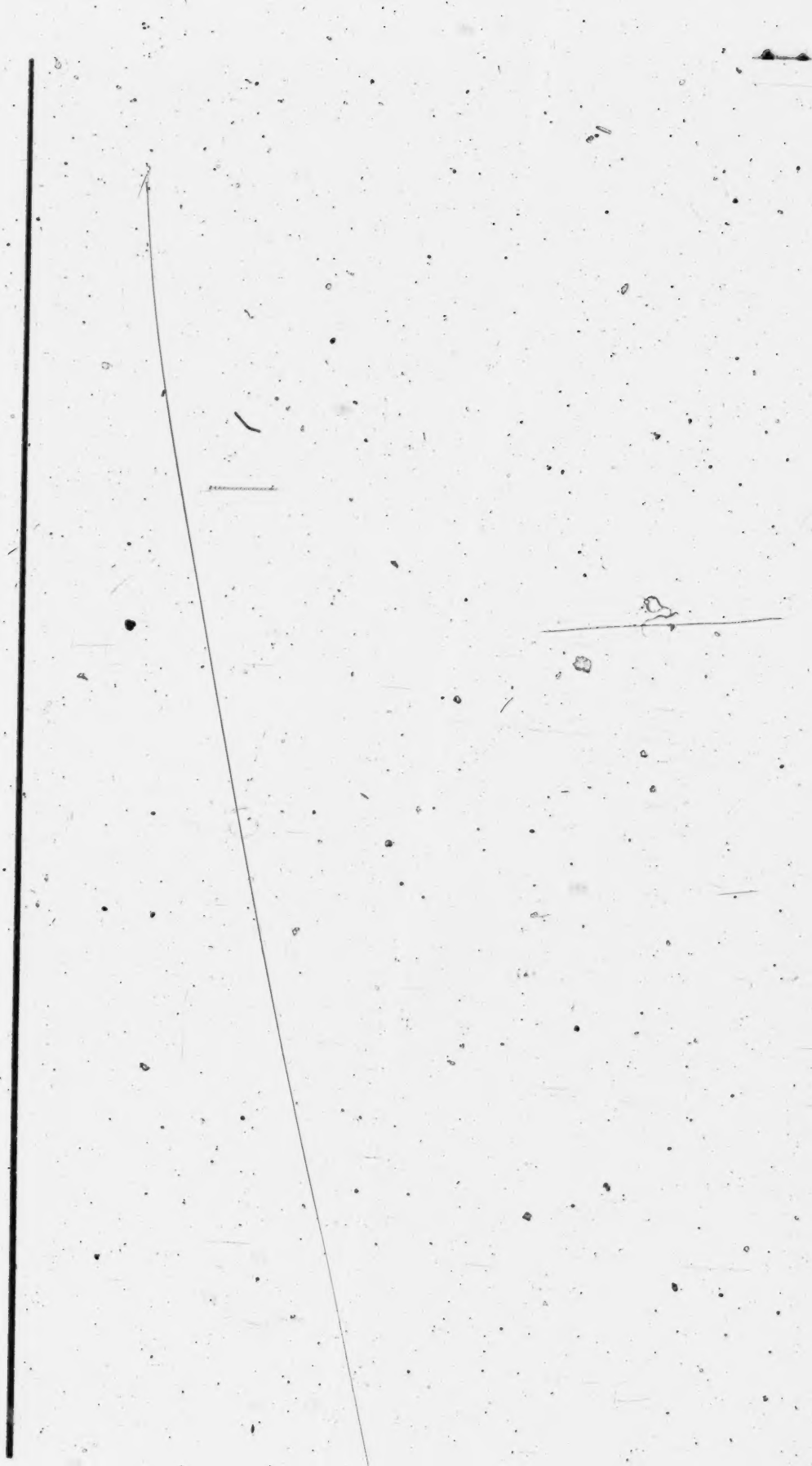

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OPINION BELOW

The judgment of the United States Court of Appeals for the District of Columbia (R. 39–40) was entered without an opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on January 24, 1945 (R. 39–40). The petition for

a writ of certiorari was filed on April 24, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

When the Federal Communications Commission grants one of two competing applications for the same frequency in the same area and designates the other application for hearing, may the applicant whose application has been designated for hearing appeal to the United States Court of Appeals for the District of Columbia under Section 402 (b) (2) of the Communications Act of 1934, as amended, as a person aggrieved or whose interests are adversely affected by the action of the Commission?

STATUTE INVOLVED

The relevant portions of the Communications Act of 1934, as amended, are set forth in the Appendix, *infra*, pp. 13–14.

STATEMENT

On March 20, 1944, the Fetzer Broadcasting Company filed with the Federal Communications Commission an application requesting authority to construct a new broadcasting station at Grand Rapids, Michigan, to operate on 1230 kilocycles with 250 watts power, unlimited time. On May 5, 1944, petitioner, the Ashbacker Radio Corpora-

tion, filed an application for permission to change the operating frequency of its Station WKBZ, Muskegon, Michigan, from 1490 kilocycles to 1230 kilocycles. The applications were mutually exclusive because simultaneous operation on 1230 kilocycles at Grand Rapids and Muskegon would result in intolerable interference to both stations. Upon an examination of the Fetzer application, and all data submitted therewith, the Commission was able to determine that a grant of the application would be in the public interest. Upon an examination of the petitioner's application and supporting data, the Commission was unable to conclude that the public interest would be served by a grant. Accordingly, pursuant to Section 309 (a) of the Communications Act of 1934, as amended (47 U. S. C. 309 (a), Appendix, *infra*, p. 13), the Commission on June 27, 1944, granted the Fetzer application and designated petitioner's application for hearing.[1] The Ashbacker Radio Corporation then filed a petition for hearing, rehearing, or other relief on July 17, 1944, directed against the grant of the Fetzer construction permit application. The petition was denied by the Commission on September 12, 1944, with an opinion (R. 8–14) setting forth the basis for denial. (R. 8–9, 13.)

[1] The hearing, which was originally scheduled for October 3, 1944, was postponed on motion of the applicant, Ashbacker Radio Corporation (R. 14, 19).

In its opinion denying the petition, the Commission, after an examination of both applications and the supporting data, pointed out that whereas a grant of the Fetzer application would result in bringing a new service to 202,800 listeners at nighttime and 238,800 listeners during the daytime, petitioner's application would only increase its listening audience by 3,972 listeners at nighttime and 9,815 listeners during the daytime. Petitioner's present daytime audience is 97,525 and its nighttime audience is 77,657. (R. 10.) The opinion also disclosed that while a grant of the Fetzer application would not result in interference to any other station, a grant of petitioner's application would involve objectionable interference to about five percent of the primary daytime service of Station WHBY at Appleton, Wisconsin (R. 11). The Commission stated that petitioner was not deprived of an opportunity for hearing but rather would have ample opportunity at the scheduled hearing to show that its operation would be in the public interest and would better serve the public interest than would a grant of the Fetzer application (R. 13). Other objections raised by petitioner to a grant of the Fetzer application were discussed and disposed of in the Commission's opinion (R. 8–14).

Upon the denial of its petition for hearing, rehearing, or other relief, petitioner, asserting that it was a "person aggrieved or whose interests are

adversely affected" by the decision of the Commission, within the meaning of Section 402 (b) (2) of the Communications Act (47 U. S. C. 402 (b) (2), Appendix, *infra*, pp. 13–14), filed in the United States Court of Appeals for the District of Columbia a notice of appeal from the grant of the Fetzer construction permit application (R. 1–4). The Commission filed a motion to dismiss the appeal for want of jurisdiction on the part of the court to entertain the appeal (R. 18–24). This motion was granted without opinion on January 24, 1945 (R. 39–40).

ARGUMENT

The question in this case is whether petitioner has any standing to appeal from the Commission's order granting the Fetzer application and designating petitioner's application for hearing. It should be noted at the outset that petitioner does not predicate its standing to appeal upon any possible interference between the proposed operation of the Fetzer station and the operation of petitioner's station on its present frequency, and in fact no such interference would be possible since the stations operate on widely separated frequencies. Nor does petitioner base its standing upon any possible competitive injury resulting to its station in Muskegon, Michigan from the operation of the Fetzer station in Grand Rapids, Michigan. Accordingly, petitioner's reference (Pet. 8–9) to *Federal Communications Commission* v.

Sanders Brothers Radio Station, 309 U. S. 470; *Federal Communications Commission* v. *National Broadcasting Company, Inc.* (*KOA*), 319 U. S. 239; and *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U. S. 4, is inapt.

Petitioner seeks to base its standing to appeal upon its status as an applicant for the same facilities granted to Fetzer. Its position, in substance, is that its proposed operation would be in the public interest and would better serve the public interest than the operation of the Fetzer Company and that a grant of the Fetzer application in some way deprives petitioner of a full opportunity to prove its position and obtain a grant of its application. This position is unsupported by the facts and disregards the procedural requirements of the Communications Act concerning the granting or denial of applications.

Under Sections 307 (a) and 309 (a) of the Communications Act (Appendix, *infra,* p. 13), the Commission is permitted to grant only those applications which it finds would serve public interest, convenience, or necessity. If the Commission can conclude from an examination of an application and supporting data that public interest will be served by a grant of the application, it may grant the application without a hearing; otherwise it must designate the application for hearing. This procedure was followed here. The Commission

granted the Fetzer application because it was able to determine from an examination of the application that public interest would be served by a grant. Petitioner's application has been designated for hearing pursuant to Section 309 (a) of the Communications Act and will be granted as required by law if upon the basis of the hearing record it appears that a grant would be in the public interest. Any advance assumption by petitioner that it will not be accorded its full legal rights at the hearing or thereafter is unwarranted and cannot excuse disregarding appropriate administrative remedies before recourse to the courts. Appeal to the courts by petitioner at this juncture is premature and will remain so until petitioner has availed itself of the administrative hearing for which its application has been designated and until the Commission, on the basis of that hearing, has had an opportunity to grant or deny petitioner's application. *Federal Power Commission* v. *Metropolitan Edison Company,* 304 U. S. 375; *Myers* v. *Bethlehem Corporation,* 303 U. S. 41; *United States* v. *Illinois Central Railroad Co.,* 244 U. S. 82.

A reference to the hearing for which petitioner's application has been designated will serve to emphasize the need for the scheduled hearing prior to resort to the courts. At that hearing petitioner must show the Commission, first, that there are no factors which would preclude a grant of its applica-

tion if there were no competing application and, second, that a grant of its application would better serve the public interest than would a grant of the competing Fetzer application. With respect to the first question, the Commission's opinion disposing of petitioner's petition for rehearing in this case pointed out that one of the facts disclosed by an examination of petitioner's application is that its proposed operation will cause objectionable interference in a portion of the daytime listening area of Station WHBY, Appleton, Wisconsin (R. 11). Consequently, before the Commission can conclude that a grant of petitioner's application would be in the public interest, even if there were no Fetzer application, petitioner will have to show the Commission at the hearing, either that its proposed operation would not cause interference to Station WHBY, Appleton, or that despite such interference it would be in the public interest for Station WHBY to suffer a curtailment in its coverage in the light of the advantages which the proposed operation of petitioner's station would produce. Moreover, it is clear that unless an appropriate showing is made on this and other issues that a grant to petitioner would be in the public interest, the Commission could not grant petitioner's application whether or not a conflicting application were on file, and there would obviously be no basis for complaint by petitioner against the grant to Fetzer. Under

such circumstances the facilities granted to Fetzer would in no event have been available to petitioner, and petitioner could not be heard to complain that someone else was granted facilities it was not eligible to receive.

Even if petitioner succeeds in showing to the Commission that a grant of its application would otherwise be in the public interest, it will still be required to show that a grant of its application would better serve the public interest than a grant of the Fetzer application. Such a showing would have to be made whether the Fetzer application was still pending or had been granted. Any fear expressed by petitioner (Pet. 10) that the authorization to Fetzer results in an additional burden of proof being placed upon it is an unwarranted anticipation concerning the action that the Commission will take at the hearing. The burden will not be greater, for the Commission has specifically stated in its opinion denying the petition for hearing, rehearing or other relief, that at the hearing

> * * * petitioner will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944. Such grant does not preclude the Commission, at a later date from taking any action which it may find will serve the public interest. In re: *Berks Broadcasting Company*

(WEEU), Reading, Pennsylvania, 8 FCC 427 (1941); In re: *The Evening News Association* (WWJ), Detroit, Michigan, 8 FCC 552 (1941); In re: *Meroed Broadcasting Company* (KYOS), Merced, California, 9 FCC 118, 120 (1942). (R. 13.)

It is thus clear that the question whether petitioner's application should be granted involves basic problems upon which the Commission has not acted and which must be acted upon by the Commission before they may properly be raised on appeal to the courts. If the Commission concludes on the basis of the scheduled hearing that petitioner's application is in the public interest, and would better serve public interest than a grant of the Fetzer application, the Commission will be required to grant the application. In that case there would be no cause for petitioner to seek judicial relief. If, on the other hand, the Commission is unable to reach a determination in favor of the petitioner it will deny the application. At that time petitioner will have ample opportunity to appeal to the United States Court of Appeals for the District of Columbia under Section 402 (b) (1) of the Communications Act (Appendix, *infra*, pp. 13–14) and to urge there any errors that it believes the Commission may have committed. Moreover, if petitioner is then unsuccessful in the Court of Appeals, a petition to this Court for a writ of certiorari would be timely. An appeal, however, before the Commis-

sion has had an opportunity to take final action on petitioner's application is premature. *Federal Power Commission* v. *Metropolitan Edison Company,* 304 U. S. 375; *Myers* v. *Bethlehem Corporation,* 303 U. S. 41; *United States* v. *Illinois Central Railroad Co.,* 244 U. S. 82.

Moreover, petitioner's contention that in all cases of competing applications each applicant is entitled to a hearing before either application is granted is unsound from a practical standpoint as well as a legal standpoint. In a field as dynamic as radio broadcasting, applications are constantly being filed, many of which are competing or mutually exclusive. In many instances the Commission is able to determine from an examination of the application that the application is meritorious or that it is palpably without merit or, in some instances, that the application was filed for the purpose of preventing or delaying the granting of other applications. Under petitioner's contention the Commission would be required to hold a hearing at any time that two or more applications were in conflict and regardless of the merits or lack of merits of one of the competitive applications. This would mean that licensing of new stations would be effectively delayed and would greatly encourage the filing of "strike applications" by persons standing to gain competitive advantages from the delay in the licensing of competing facilities.

CONCLUSION

The decision below is correct, and no conflict is presented. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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Federal Communications Commission.

MAY 1945.

APPENDIX

The relevant portions of the Communications Act of 1934 (48 Stat. 1064), as amended, are as follows:

SEC. 307 (a). The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act. (47 U. S. C. 307 (a).)

SEC. 309 (a). If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe. (47 U. S. C. 309 (a).)

SEC. 402 (b). An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio

station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission. (47 U. S. C. 402 (b).)

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No. 65

In the Supreme Court of the United States

OCTOBER TERM, 1945

ASHBACKER RADIO CORPORATION, A MICHIGAN CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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OPINION BELOW

The judgment of the United States Court of Appeals for the District of Columbia (R. 39–40) was entered on January 24, 1945 without an opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on January 24, 1945 (R. 39–40). The petition for a writ of certiorari was filed on April 24, 1945, and was granted on May 28, 1945 (R. 41). The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

When the Federal Communications Commission grants one of two competing applications for the same frequency in the same area and designates the other application for hearing, may the applicant whose application has been designated for hearing appeal to the United States Court of Appeals for the District of Columbia under Section 402 (b) of the Communications Act of 1934, as amended?

STATUTE AND REGULATIONS INVOLVED

The relevant portions of the Communications Act of 1934, as amended, and the regulations of the Federal Communications Commission are set forth in the Appendix, *infra,* pp. 23–29.

STATEMENT

On March 20, 1944, the Fetzer Broadcasting Company filed with the Federal Communications Commission an application requesting authority to construct a new broadcasting station at Grand Rapids, Michigan, to operate on 1230 kilocycles with 250 watts power, unlimited time. On May 5, 1944, petitioner, the Ashbacker Radio Corporation, filed an application for permission to change the operating frequency of its Station WKBZ, Muskegon, Michigan, from 1490 kilocycles to 1230 kilocycles. The applications were

mutually exclusive because simultaneous operation on 1230 kilocycles at Grand Rapids and at Muskegon would result in intolerable interference to both stations. Upon an examination of the Fetzer application and all data submitted therewith the Commission was able to determine that a grant of the application would be in the public interest. Upon an examination of the petitioner's application and supporting data, the Commission was unable to conclude that the public interest would be served by a grant. Accordingly, pursuant to Section 309 (a) of the Communications Act of 1934, as amended (47 U. S. C. 309 (a), Appendix, *infra,* pp. 23–24), the Commission on June 27, 1944, granted the Fetzer application and designated petitioner's application for hearing.[1] The Ashbacker Radio Corporation then filed a petition for hearing, rehearing, or other relief on July 17, 1944, directed against the grant of the Fetzer construction permit application. The petition was denied by the Commission on September 12, 1944, with an opinion (R. 8–14) setting forth the basis for denial (R. 8–9, 13).

In its opinion denying the petition, the Commission summarized the factual data submitted with the applications involved, which formed the basis for the Commission's action. It pointed out that from an examination of both applications

[1] The hearing, which was originally scheduled for October 3, 1944, was postponed on motion of the applicant, Ashbacker Radio Corporation (R. 14, 19).

and the supporting data, it appeared that a grant of the Fetzer application would result in bringing a new service to 202,800 listeners at nighttime and 238,800 listeners during the daytime, whereas petitioner's application would only increase its listening audience by 3,972 listeners at nighttime and 9,815 listeners during the daytime. Its present daytime audience is 97,525 and its nighttime audience is 77,657. (R. 10.) The opinion also pointed out that a grant of the Fetzer application would not result in interference to any other station but a grant of petitioner's application would involve objectionable interference to about five percent of the primary daytime service of Station WHBY at Appleton, Wisconsin. (R. 11.) The Commission, therefore, denied the petition for rehearing, pointing out that petitioner was not thereby being deprived of an opportunity for hearing. The Commission stated that the grant of Fetzer's application did "not preclude the Commission, at a later date from taking any action which it may find will serve the public interest" and that petitioner would have ample opportunity at the scheduled hearing on its application to show that its operation would better serve the public interest than would the Fetzer grant. If it made such a showing, its application would be granted. (R. 13.) Other objections raised by petitioner to a grant of the Fetzer application were discussed and disposed of in the Commission's opinion. (R. 8–14.)

Upon the denial of its petition for hearing, rehearing, or other relief, petitioner, asserting that it was a "person aggrieved or whose interests are adversely affected" by the decision of the Commission, within the meaning of Section 402 (b) (2) of the Communications Act (47 U. S. C. 402 (b) (2), Appendix, *infra,* p. 26), filed in the United States Court of Appeals for the District of Columbia a notice of appeal from the grant of the Fetzer construction permit application (R. 1–4). The Commission filed a motion to dismiss the appeal for want of jurisdiction on the part of the court to entertain the appeal (R. 18–24). This motion was granted without opinion on January 24, 1945 (R. 39–40).

SUMMARY OF ARGUMENT

Petitioner is not entitled to secure judicial review of the Commission's action in granting the application of the Fetzer Broadcasting Company either under Section 402 (b) (1) of the Federal Communications Act, on the ground that its own application has in effect been denied, or under Section 402 (b) (2) on the ground that the Fetzer application was improperly granted.

The Commission has not denied petitioner's application but has set it down for hearing and will not pass finally upon it until that hearing has been held. In effect, petitioner is seeking to appeal from the order setting its application down for hearing. The designation of a matter for hear-

ing is, however, not the type of administrative action which the courts will review prior to a final determination.

Petitioner's broadcasting station operates upon a different wave length from that which has been allotted to the Fetzer Corporation, and petitioner does not base its appeal upon possible competitive injury. Accordingly, *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, and *Federal Communications Commission* v. *National Broadcasting Company (KOA)*, 319 U. S. 239, have no application. Petitioner's complaint is that grant of the Fetzer application has impaired its opportunity to obtain a grant of its own application. This contention, however, cannot prevail in the face of the Commission's authority under Sections 309 (a) and 319 (a) of the Federal Communications Act to grant an application without a hearing when it can determine from an examination of the application that the public interest will thereby be served.

Petitioner is protected by the provision of Section 312 (b) of the Act that any license or permit, including the permit of the Fetzer Corporation, may be modified and by the Commission's reservation in its opinion upon rehearing in the Fetzer proceeding of authority to take any subsequent action with regard to that permit which it might find to be in the public interest. If petitioner at the hearing upon its application fails

to make out a case, it is not aggrieved by grant of the Fetzer application; if, on the other hand, petitioner shows that the public interest will be served by granting its application, the application will be granted and the Fetzer permit may be modified or recalled. Petitioner, moreover, may at that stage appeal from a denial of its application, if the Commission should fail to grant it.

Moreover, even if petitioner's interest were less fully protected than it is, it would not have a right of appeal at this stage. Its interest consists at most of a claim which it has staked out for itself in the public domain, to which no substance is given by any provision of law. Petitioner is not entitled to preservation of the status quo pending a hearing upon its application. On the contrary the provision of the Act that applications may be granted without a hearing necessarily includes applications which competed with petitioner's. The courts may not accord to competing applicants a right to simultaneous adjudication which the statute does not give.

The Commission has been granted discretionary power to determine "subordinate questions of procedure", including the order in which applications shall be heard. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138. As a practical matter it is necessary that the Commission be able to exercise these powers in relation to mutually exclusive applica-

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tions for broadcasting privileges. The broadcasting industry is dynamic, and the public interest requires flexible procedures within the framework of the Communications Act.

ARGUMENT

Petitioner seeks review on two grounds (Br. 6): first, that the Commission's action in granting the Fetzer application and setting petitioner's application for hearing amounts to a denial of its application, and that therefore it is entitled to appeal under the provisions of Section 402 (b) (1) of the Communications Act; and second, that it is a person aggrieved or whose interests are adversely affected by the grant of the Fetzer application, entitled to appeal under the provisions of Section 402 (b) (2). Both of these contentions are without merit.

I

PETITIONER'S APPLICATION HAS NOT BEEN DENIED. PETITIONER THEREFORE LACKS STANDING TO APPEAL UNDER SECTION 402 (b) (1) OF THE COMMUNICATIONS ACT

Petitioner's argument that the grant to Fetzer is in fact a denial of its own application is unsound. The Commission has not denied petitioner's application, but has set it down for hearing. Upon the basis of that hearing the Commission will determine whether the application should be granted or denied. Until that determination is made, the application has not been denied. The

right to appeal under Section 402 (b) (1) (*infra*, p. 26) is therefore not available to petitioner.

In fact, what petitioner is complaining of, in addition to the Commission's action in granting the Fetzer application, is its failure to grant without hearing petitioner's own application and its setting that application down for hearing to determine after a fuller development of the facts whether the public interest would be served by granting it.

The designation of a matter for hearing is, however, not the type of administrative action which the courts will review prior to a final determination after the hearing. *Federal Power Commission* v. *Edison Co.*, 304 U. S. 375; *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82; cf. *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 130–131. Petitioner's fears that the Commission may ultimately refuse its application cannot serve as a substitute for final Commission action disposing of the application after the hearing which has been set. *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159, 208–209; *Petersen Baking Co.* v. *Bryan*, 290 U. S. 570, 575–576; *Myers* v. *Bethlehem Corp.*, 303 U. S. 41. Indeed, the Commission has made no statement and has taken no action which forecloses the result of the hearing. And the Commission has expressly stated in its decision on

petitioner's request for rehearing that its application may be granted after hearing if the requisite showing is made that the public interest will be served (R. 13). There is therefore no basis for permitting petitioner to resort to the courts with respect to that application prior to the completion of the hearing.

It is demonstrated in the discussion of petitioner's right to appeal under Section 402 (b) (2) (*infra*, p. 26) that the Commission's action in granting the Fetzer application does not result in present injury to petitioner and does not foreclose petitioner from succeeding upon the hearing that has been scheduled. In any event, even if petitioner is a "person aggrieved" by the Fetzer grant, entitled to appeal from that grant under Section 402 (b) (2), it is at least clear that the Commission has taken no action which amounts to a refusal of petitioner's application within the meaning of Section 402 (b) (1). On the one hand, before petitioner can secure a license it must make the requisite showing that the public interest will be served; on the other hand, the Commission's action upon petitioner's application must await the hearing upon it. Until a determination is made by the Commission after that hearing, a resort to the courts under the provisions of Section 402 (b) (1) is premature.

II

PETITIONER IS NOT AGGRIEVED NOR ARE ITS INTERESTS ADVERSELY AFFECTED BY THE ACTION OF THE COMMISSION IN GRANTING THE FETZER APPLICATION WITHOUT A HEARING, SO AS TO ENTITLE IT TO APPEAL

Petitioner does not urge in support of its asserted right to appeal under Section 402 (b) (2) (*infra*, p. 26) as a person aggrieved or one whose interests are adversely affected by the action of the Commission in granting a construction permit to Fetzer, that there will be electrical interference with the operation of petitioner's station on its present frequency. No such interference would arise since the two stations would operate on widely separated frequencies. Nor does petitioner base its standing to appeal upon any possible competitive injury resulting to its station in Muskegon, Michigan, from the proposed operation of the Fetzer station in Grand Rapids, Michigan. Accordingly, the cases of *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, and *Federal Communications Commission* v. *National Broadcasting Company* (*KOA*), 319 U. S. 239, cited by appellant (Br. 9), have no application here. Petitioner's only complaint is that grant of the Fetzer application has in some manner injured petitioner by impairing its opportunity to obtain a grant of its own application, rendering the scheduled hearing upon that application largely meaningless. (Br. 8–13.)

Petitioner argues that the Fetzer Corporation already has its authorization, which conflicts with petitioner's proposed operation, and that the Commission cannot set aside this grant irrespective of any showing petitioner may make at its hearing. This argument completely overlooks the procedural provisions of the Communications Act, the limitations upon any grant which the Commission makes, including the grant to Fetzer, and the express condition which is attached to the Fetzer construction permit by the Commission's opinion upon petitioner's application for rehearing. Under Sections 309 (a) and 319 (a) of the Act (*infra,* pp. 23–25), which have been uniformly construed together, cf. *Goss* v. *Federal Radio Commission,* 67 F. 2d 507 (App. D. C.), the Commission is authorized to grant an application without a hearing when it can determine from the application and the supporting data that the public interest would be served by a grant.[2] If it cannot make such a determination,

[2] In view of the express provisions of Section 309 (a) there can be no doubt of the Commission's authority to make such grants without hearing in appropriate cases. This section was formerly section 11 of the Radio Act of 1927, and was brought over verbatim into the Communications Act. The House Managers in charge of H. R. 9971, 69th Cong., which became the Radio Act of 1927, explained the purpose of Section 11 as follows:

"Section 11 authorizes the licensing authority * * * to issue licenses upon examination of the application if it determines that public interest, convenience, or necessity would be served by the granting thereof. It provides, however, that in the event the licensing authority upon examina-

it must designate the application for hearing. Any license or permit which it issues is subject to the limitation, contained in Section 312 (b) (*infra*, p. 24), that it "may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act * * * will be more fully complied with: *Provided* * * * the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefore and shall have been given reasonable opportunity to show cause why such an order of modification should not issue." In its opinion upon rehearing, moreover, the Commission reserved the power to take any action with

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tion of an application does not reach such decision with respect thereto, it shall then notify the applicant and fix and give notice of a time and place of hearing on the application." (68 Cong. Rec. 2563.)

This authority enables the Commission to dispose expeditiously of thousands of applications for all types of new radio facilities and modifications and renewals of existing grants. During the fiscal year ending June 30, 1944, the Commission received approximately 25,000 applications for radio station facilities and issued approximately 20,000 authorizations. *Tenth Annual Report of the Federal Communications Commission* (1944), pp. 13, 22, 74. Of these 1,689 were for standard broadcast stations and 1,039 for other types of commercial and related broadcasting; but conflicting applications present a problem in certain other fields as well. Idem, 58–59 (aviation communication) and 63 (police radio).

regard to the Fetzer permit which it might find to be in the public interest.

In this case the Commission was able to determine from an examination of the Fetzer application that the proposed operation would not result in any interference to an existing station and that the public interest would be served by a grant. Accordingly, it granted the application without a hearing. In the case of petitioner's application it appeared that some objectionable interference would result to Station WHBY at Appleton, Wisconsin. Because of this fact, among others, the Commission was unable to reach a determination that a grant of petitioner's application would serve the public interest and accordingly designated it for hearing pursuant to the provisions of Section 309 (a). Petitioner thereupon filed a petition for rehearing of the Fetzer application pursuant to Section 405 of the Communications Act (*infra,* pp. 26–27). In its petition, petitioner attempted to show that a grant of the Fetzer application was not in the public interest. If the facts recited in the petition for rehearing had in the Commission's judgment raised a serious question whether the grant of the Fetzer application was in the public interest, the Commission would have ordered a rehearing. However, the Commission considered specifically all of the points raised in the petition for rehearing and, with an opinion which found them to be without merit (R. 8–14), denied the petition.

The Commission recognized that since both the Fetzer Corporation and petitioner requested the same facilities, a grant to one, if permitted to stand, would preclude their grant to the other. Accordingly it expressly pointed out in its opinion that the grant of the Fetzer application and the denial of the petition for rehearing did not preclude the Commission at a later date "from taking any action" with respect to the Fetzer construction permit "which it may find will serve the public interest" (R. 13; see also R. 17, 22). Thus, the grant of the Fetzer application is made subject to any action which the Commission may take as a result of the hearing which is to be held on petitioner's application.[3] If as a result of that hearing petitioner fails to show that a grant of its application will serve the public interest, then it is in no way aggrieved by the grant of the Fetzer application. If petitioner at the hearing on its application demonstrates that its proposed operation would better serve the public interest than that of the Fetzer Corporation, the Commission would be required to grant petitioner's application and to proceed to modify the Fetzer permit

[3] The Commission has consistently taken this position. See In re: *Evangelical Lutheran Synod of Missouri, Ohio, and Other States* (*KFUO*), 8 FCC 118 (1940); In re: *Berks Broadcasting Company* (*WEEU*), 8 FCC 427 (1941); In re: *The Evening News Association* (*WWJ*), 8 FCC 552, 556 (1941); In re: *Merced Broadcasting Company* (*KYOS*), 9 FCC 118, 120 (1942).

to accord with it, by specifying a different frequency or otherwise, or to recall the permit by virtue of the reservation contained in the opinion upon rehearing.[4] If the Commission should fail to grant petitioner's application under these circumstances, petitioner could then file an appeal from the denial of its application under Section 402 (b) (1) and at that time obtain review of any errors involved in the Commission's ruling. Prior to that time an appeal by petitioner is premature.

Moreover, even if petitioner's interest were less fully protected than it is in relation to the grant to the Fetzer Corporation, there would be no right of appeal on its part from the grant. Petitioner's interest lies at most in a claim which it has staked out for itself in the public domain, to which no substance is given by any provision of law. That claim can only receive legal substance at the hands of the Federal Communications Commission in the light of such legally recognized interests as may have come to prevail at the time it is adjudicated. Nothing in the Communications Act or elsewhere suggests that petitioner is entitled, pending a hearing, to a preservation of the status quo at the time its application was filed. On the contrary,

[4] The hearing or opportunity to show cause, to which the Fetzer Corporation would be entitled under Section 309 (a) or 312 (b) of the Communications Act before its permit might be recalled or modified, could be consolidated with the hearing upon petitioner's application. The Fetzer Corporation was permitted to intervene as a party in the Ashbacker proceeding on October 4, 1944.

the Act expressly provides that applications may be granted without a hearing by the Commission, and this necessarily includes applications which compete with petitioner's. To hold otherwise would be to fly in the face of the statute. The provisions of the Act may not be thus negatived. As the courts may not compel recognition of "rights of priority" in applicants to receive consideration at the hands of the Commission as against later applicants, such as "only Congress could confer" (*Federal Communications Comm.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145), so may they not accord to competing applicants a right to simultaneous adjudication which the statute does not give or reach the same result by indirection through recognition of a right to appeal, claimed solely because one application was preferred in point of time. Petitioner must take its chances according to the situation which exists at the time its claim is passed upon under the Commission's procedures, subject to the provisions contained in the statute whereby previous rights may be modified in recognition of new applications. It has in the meantime had the benefit of careful consideration of its application on two occasions (R. 14–15), in connection with the application of the Fetzer Corporation.

It is of course true that the Commission must proceed to deal with applications according to the Act and within the discretion conferred upon it.

It is also required to frame its procedures according to the needs which it is called upon to serve. Among those needs are reasonable economy and expedition in the procedures employed. The Commission has been granted flexible powers to determine, among other "subordinate questions of procedure", "whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions". (309 U. S. at 138.) It has exercised these powers resourcefully with respect to the procedural problems here involved.[5]

As a practical matter it is necessary that the Commission be able to grant one of several mutually exclusive applications without a hearing, when in its judgment the public interest would be served thereby. In a field as dynamic as radio broadcasting,[6] many competing applica-

[5] The development of the Commission's procedure with respect to intervention and petitions for rehearing is treated in the Final Report of the Attorney General's Committee on Administrative Procedure (1941) at pp. 131–132 and in Committee Monograph No. 3, dealing with the Commission, Sen. Doc. 186, 76th Cong., 3d sess., Part 3, at pp. 12–21. See *infra*, footnote 7.

[6] The procedural requirements in different fields of regulation necessarily vary considerably, and in the same field may vary from time to time. Partly for this reason, the discretion of Federal administrative agencies in respect to third-party participation in proceedings has largely been preserved by statute and has been variously exercised. See Oberst, *Parties to Administrative Proceedings*, 40 Mich. L. Rev. 378 (1942).

tions are constantly being filed. Frequently the Commission is able to determine from examining an application that it is meritorious and from examining a competing application that it is extremely unlikely to prevail, or in some instances that it was filed for the purpose of preventing or delayng the granting of other applications. Under petitioner's contention the Commission would nevertheless be required to hold a hearing in such a situation, with the result that the licensing of new stations would be effectively delayed and that the filing of "strike applications" for purposes of delay would be encouraged.[7] Under the procedure followed by the Commission, it is

[7] Prior to its present rule governing intervention in proceedings before the Commission (Rules and Regulations, Sec. 1.102, 47 C. F. R. 1.102), the Commission's rules governing intervention permitted practically anyone asserting any interest to intervene in a case before the Commission. With respect to this practice, which resulted in such serious obstruction to the Commission's activity that it had to be abolished, the monograph of the Attorney General's Committee on Administrative Procedure which dealt with the Commission stated, "the purpose of the intervener's dilatory tactics was, in many cases, to frustrate the licensing and operation of a competing station for as long a period as possible. It was believed that the cost of maintaining proceedings before the Commission and the courts could easily be covered by the continued revenues from sponsors who might be lost if a competing station were in existence." Administrative Procedure in Government Agencies, Monograph No. 3, S. Doc. 186, 76th Cong., 3rd Sess., Part 3, pp. 16–17. The same condition would clearly arise again to plague the Commission if the simple device of filing a competing application were permitted to delay Commission action on an obviously meritorious application.

possible for it to proceed expeditiously in meritorious cases and thereby to render maximum service to the industry and to the public with a limited staff. The interests of other applicants are protected to the greatest extent possible, as petitioner's have been, by means of the hearings on their applications, the statutory authority to modify previous grants, and in some instances, as here, the reservation by the Commission of authority to withdraw a competing grant which has been made without hearing.

The difficulties which would be created if the Commission were unable to grant any license application before according a hearing to a competing applicant are emphasized by recent developments in the radio broadcasting field, notably frequency modulation broadcasting (FM) and television. We are advised that approximately 2,000 FM stations will probably be constructed during the next five years. Each will require a construction permit from the Commission. In the case of such cities as New York and Philadelphia the number of applicants already exceeds the number of frequencies available for distribution. If the Commission were required to afford a hearing to each applicant for particular facilities before any grant could be made, however obviously lacking in merit some of the applications might be, substantial delay in the development of the industry, of service to the public, and of the art of broadcasting

would result. It is clear, therefore, that the discretionary power of the Commission with respect to procedure remains of great importance. We submit that it should not be limited by a strained construction of the statute—a construction which we think is clearly negatived by the terms of the Communications Act.

Petitioner's statement (Br. 4) that the Commission's action in granting the Fetzer application was based upon facts contained in the application for which there was no evidentiary support is misleading. Not only was petitioner's application considered at the same time (R. 14–15), but both applications were subjected to careful review by the Broadcast Division of the Engineering Department of the Commission and by the Accounting and Legal Departments, to which all applications are subjected before action is taken.[8] The Commission is not an uninformed body, wholly dependent upon the data which may be supplied to it by applicants. On the contrary, as is well known, it possesses extensive knowledge of conditions in the broadcasting industry. By means of that knowledge and of the services of an expert staff, it is able to exercise an informed initial judgment upon applications. Its methods, therefore, provide assurance of fairness which may not be ignored and which justifies Commis-

[8] Monograph of the Attorney General's Committee on Administrative Procedure, *supra*, footnote 7, pp. 8–12.

sion action in numerous instances in which the testimonial processes of a hearing are not employed.

Since petitioner suffered no wrong in the grant of the Fetzer application, it has no standing to appeal from that grant.

CONCLUSION

For the foregoing reasons, we submit that the judgment of the court below dismissing petitioner's appeal should be affirmed.

J. HOWARD MCGRATH,
Solicitor General.

RALPH F. FUCHS,
Department of Justice.

ROSEL H. HYDE,
General Counsel.

HARRY M. PLOTKIN,
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Attorneys,
Federal Communications Commission.

OCTOBER 1945.

APPENDIX

Federal Communications Act of ~~1934~~, as amended (48 Stat. 1064, 47 U. S. C. 161 et seq.): et seq.):

ALLOCATION OF FACILITIES: TERM OF LICENSES

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

* * * * *

HEARINGS ON APPLICATIONS FOR LICENSES; FORM OF LICENSES; CONDITIONS ATTACHED TO LICENSES

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under

such rules and regulations as it may prescribe.

* * * * *

REVOCATION OF LICENSES

Sec. 312.

* * *

(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

* * * * *

CONSTRUCTION PERMITS

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the

station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission

that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

* * * * *

PROCEEDINGS TO ENFORCE OR SET ASIDE THE COMMISSION'S ORDERS—APPEAL IN CERTAIN CASES

SEC. 402. * * *

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

* * * * *

REHEARING BEFORE COMMISSION

SEC. 405. After a decision, order, or requirement has been made by the Commis-

sion in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: *Provided, however,* That in the case of a decision, order, or requirement made under title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission.

* * * * *

Rules of Practice and Procedure of the Federal Communications Commission (47 C. F. R. Sec. 1.1 et seq.):

§ 1.356 *Forfeiture of construction permits; extensions of time.*—(a) A construction permit shall be automatically forfeited if the station is not ready for operation within the time specified therein or within such further time as the Commission may have allowed for completion, and a notation of the forfeiture of any construction permit under this provision will be placed in the records of the Commission as of the expiration date.

(b) Any application for extension of time within which to construct a station shall be filed at least thirty days prior to the expiration date of such permit if the facts supporting such application for extension are known to the applicant in time to permit such filing. In other cases such applications will be accepted upon a showing satisfactory to the Commission of sufficient reasons for filing within less than thirty days prior to the expiration date. Such applications will be granted upon a specific and detailed showing that the failure to complete was due to causes not under the control of the grantee, or upon a specific and detailed showing of other matters sufficient to justify the extension.

* * * * *

§ 1.402 *Modification.*—(a) *Order to show cause.*—Whenever the Commission shall determine that public interest, convenience, and necessity would be served, or any treaty ratified by the United States will be more fully complied with, by the modification of any radio station construction permit or license either for a limited time, or for the duration of the term thereof, it shall issue an order for such licensee to show cause why such construction permit or license should not be modified.

U. S. GOVERNMENT PRINTING OFFICE: 1945

SUPREME COURT OF THE UNITED STATES.

No. 65.—October Term, 1945.

Ashbacker Radio Corporation, Petitioner, *vs.* Federal Communications Commission.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[December 3, 1945.]

Mr. Justice Douglas delivered the opinion of the Court.

The primary question in this case is whether an applicant for a construction permit under the Federal Communications Act (48 Stat. 1064, 47 U. S. C. § 151) is granted the hearing to which he is entitled by § 309(a) of the Act,[1] where the Commission, having before it two applications which are mutually exclusive, grants one without a hearing and sets the other for hearing.

In March 1944 the Fetzer Broadcasting Company filed with the Commission an application for authority to construct a new broadcasting station at Grand Rapids, Michigan, to operate on 1230 kc with 250 watts power, unlimited time. In May 1944, before the Fetzer application had been acted upon, petitioner filed an application for authority to change the operating frequency of its station WKBZ of Muskegon, Michigan, from 1490 kc with 250 watts power, unlimited time, to 1230 kc. The Commission, after stating that the simultaneous operation on 1230 kc at Grand Rapids and Muskegon "would result in intolerable interference to both applicants," declared that the two applications were "actually exclusive." The Commission upon an examination of the Fetzer application and supporting data granted it in June 1944 without a hearing. On the same day the Commission designated petitioner's application for hearing. Petitioner thereupon filed a petition for hearing, rehearing and other relief directed against the grant of the Fetzer application. The Commission denied this petition, stating,

[1] Sec. 319 relates to applications for construction permits. But since such applications are in substance applications for station licenses (Goss *v.* Federal Radio Commission, 67 F. 2d 507, 508) the Commission in such cases uniformly follows the procedure prescribed in § 309(a) for station licenses.

> "The Commission has not denied petitioner's application. It has designated the application for hearing as required by Section 309(a) of the Act. At this hearing, petitioner will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944. Such grant does not preclude the Commission, at a later date from taking any action which it may find will serve the public interest. In re: *Berks Broadcasting Company* (WEEU), Reading, Pennsylvania, 8 FCC 427 (1941); In re: *The Evening News Association* (WWJ), Detroit, Michigan, 8 FCC 552 (1941); In re: *Merced Broadcasting Company* (KYOS), Merced, California, 9 FCC 118, 120 (1942)."

Petitioner filed a notice of appeal from the grant of the Fetzer construction permit in the Court of Appeals for the District of Columbia, asserting that it was a "person aggrieved or whose interests are adversely affected" by the action of the Commission within the meaning of § 402(b)(2) of the Act.[2] The Commission filed a motion to dismiss the appeal for want of jurisdiction on the part of the court to entertain it. This motion was granted without opinion. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

Our chief problem is to reconcile two provisions of § 309(a) where the Commission has before it mutually exclusive applications. The first authorizes the Commission "upon examination" of an application for a station license to grant it if the Commission determines that "public interest, convenience, or necessity would be served" by the grant.[3] The second provision of § 309(a) says that if, upon examination of such an application, the Commission does not reach such a decision, "it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under

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[2] The relevant provisions of § 402(b) read as follows:

> "An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
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> . . . . . .
>
> "(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

[3] Sec. 307(a) provides, "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter."

such rules and regulations as it may prescribe."[4] It is thus plain that § 309(a) not only gives the Commission authority to grant licenses without a hearing, but also gives applicants a right to a hearing before their applications are denied. We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denial of their applications becomes an empty thing. We think that is the case here.

The Commission in its notice of hearing on petitioner's application stated that the application "will not be granted by the Commission unless the issues listed above are determined in favor of the applicant on the basis of a record duly and properly made by means of a formal hearing." One of the issues listed was the determination of "the extent of any interference which would result from the simultaneous operation" of petitioner's proposed station and Fetzer's station. Since the Commission itself stated that simultaneous operation of the two stations would result in "intolerable interference" to both, it is apparent that petitioner carries a burden which cannot be met. To place that burden on it is in effect to make its hearing a rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application. That may satisfy the strict letter of the law but certainly not its spirit or intent.[5]

The Fetzer application was not conditionally granted pending consideration of petitioner's application. Indeed a stay of it pend-

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[4] Sec. 309(a) reads as follows:

"If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

[5] The Commission recognizes in its regulations the desirability of hearing such related matters at the same time or in consolidated cases. By § 1.193, 47 Code Fed. Reg. Cum. Supp. it is provided:

"In fixing dates for hearings the Commission will, so far as practicable, endeavor to fix the same date for separate hearings (a) on all related matters which involve the same applicant, or arise out of the

ing the outcome of this litigation was denied. Of course the Fetzer license, like any other license granted by the Commission, was subject to certain conditions which the Act imposes as a matter of law. We fully recognize that the Commission, as it said, is not precluded "at a later date from taking any action which it may find will serve the public interest." No licensee obtains any vested interest in any frequency.[6] The Commission for specified reasons may revoke any station license pursuant to the procedure prescribed by § 312(a) and may suspend the license of any operator on the grounds and in the manner specified by § 303(m). It may also modify a station license if in its judgment "such action will promote the public interest, convenience, and necessity, or the provisions of this chapter * * * will be more fully complied with." § 312(b). And licenses for broadcasting stations are limited to three years, the renewals being subject to the same considerations and practice which affect the granting of original applications. § 307(d). But in all those instances the licensee is given an opportunity to be heard before final action can be taken.[7] What the Commission can do to Fetzer it can do to any licensee. As the Fetzer application has been granted, petitioner, therefore, is presently in the same position as a newcomer who seeks to displace an established broadcaster. By the grant of the Fetzer application petitioner has been placed under a greater burden than if its hearing had been earlier. Legal theory is one thing. But the practicalities are different. For we are told how difficult it is for a newcomer to make the comparative showing necessary to displace an established licensee. *Peoria Broadcasting Co. and Illinois*

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same complaint or cause; and (b) for separate hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature."

And by § 1.194, 47 Code Fed. Reg. Cum. Supp. it is provided:

"The Commission, upon motion, or upon its own motion, will, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing (a) any cases which involve the same applicant or arise from the same complaint or cause, or (b) any applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature."

[6] See §§ 301, 304, 307(d), 309(b)(1) of the Act. "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." Federal Communications Commission *v.* Sanders Bros. Radio Station, 309 U. S. 470, 475.

[7] For the regulations of the Commission governing these procedures see 47 Code Fed. Reg. Cum. Supp. § 1.401 (revocation), § 1.359 and §1.402 (modification), § 1.411 and § 1.412 (suspension), § 1.360 (renewal).

Broadcasting Co., 1 F. C. C. 167. No suggestion is made here as in *Matheson Radio Co., Inc.*, 8 F. C. C. 427 or *The Evening News Association*, 8 F. C. C. 552, that it may be possible to make workable adjustments so that both applications can be granted. The Commission concedes that "these applications are actually exclusive." The applications are for a facility which can be granted to only one. Since the facility has been granted to Fetzer, the hearing accorded petitioner concerns a license facility no longer available for a grant unless the earlier grant is recalled. A hearing designed as one for an available frequency becomes by the Commission's action in substance one for the revocation or modification of an outstanding license. So it would seem that petitioner would carry as a matter of law the same burden regardless of the precise provisions of the notice of hearing.

It is suggested that the Commission by granting the Fetzer application first concluded that the public interest would be furthered by making Fetzer's service available at the earliest possible date. If so, that conclusion is only an inference from what the Commission did. There is no suggestion, let alone a finding, by the Commission that the demands of the public interest were so urgent as to preclude the delay which would be occasioned by a hearing.

The public, not some private interest, convenience, or necessity governs the issuance of licenses under the Act. But we are not concerned here with the merits.[8] This involves only a matter of procedure. Congress has granted applicants a right to a hearing on their applications for station licenses.[9] Whether that is wise policy or whether the procedure adopted by the Commission in this case is preferable is not for us to decide. We only hold that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.

In *Federal Communication Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 476-477, we held that a rival station which would suffer economic injury by the grant of a license to another station had standing to appeal under § 402(b)(2) of the Act. In

[8] See Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 145-146.

[9] Apparently no regulation exists which, for orderly administration, requires an application for a frequency, previously applied for, to be filed within a certain date. Nor is there any suggestion that petitioner's application, which was filed shortly after Fetzer's, was not filed in good faith.

Federal Communications Commission v. *National Broadcasting Co.*, 319 U. S. 239, we reached the same conclusion where an application had been granted which would create such interference on the channel given an existing licensee as in effect to modify the earlier license. Petitioner is at least as adversely affected by the action of the Commission in this case as were the protestants in those cases. While the statutory right of petitioner to a hearing on its application has in form been preserved, it has as a practical matter been substantially nullified by the grant of the Fetzer application.[10]

Reversed.

Mr. Justice BLACK and Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[10] A license to operate a station is required in addition to a permit to construct one. As respects an operating license § 319(b) provides:

> "Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit."

For the regulations of the Commission governing such applications see 47 Code Fed. Reg. Cum. Supp. § 1.357. It was conceded on oral argument that in that proceeding petitioner would not be entitled to intervene to challenge the propriety of the grant of the construction permit to Fetzer without a hearing on petitioner's application.

SUPREME COURT OF THE UNITED STATES.

No. 65.—October Term, 1945.

Ashbacker Radio Corporation, Petitioner, *vs.* Federal Communications Commission.	On Writ of Certiorari to the Court of Appeals for the District of Columbia.

[December 3, 1945.]

Mr. Justice Frankfurter, dissenting.

The extent to which administrative agencies are to be entrusted with the enforcement of federal legislation is for Congress to determine. Insofar as the actions of these agencies come under the scrutiny of judicial review, it is the business of the courts to respect the distribution of authority that Congress makes as between administrative and judicial tribunals. Of course courts must hold the administrative agencies within the confines of their Congressional authority. But in doing so they should not even unwittingly assume that the familiar is the necessary and demand of the administrative process observance of conventional judicial procedures when Congress has made no such exaction. Since these agencies deal largely with the vindication of public interest and not the enforcement of private rights, this Court ought not to imply hampering restrictions, not imposed by Congress, upon the effectiveness of the administrative process. One reason for the expansion of administrative agencies has been the recognition that procedures appropriate for the adjudication of private rights in the courts may be inappropriate for the kind of determinations which administrative agencies are called upon to make.

The disposition of the present case seems to me to disregard these controlling considerations, if the Court now holds, as I understand it so to do, that whenever conflicting applications are made for a radio license the Communications Commission must hear all the applications together.

In the regulation of broadcasting, Congress moved outside the framework of protected property rights. See *Commission* v. *Sanders Radio Station*, 309 U. S. 470. Congress could have retained

for itself the granting or denial of the use of the air for broadcasting purposes, and it could have granted individual licenses by individual enactments as in the past it gave river and harbor rights to individuals. Instead of making such a crude use of its Constitutional powers, Congress, by the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 151, formulated an elaborate licensing scheme and established the Federal Communications Commission as its agency for enforcement. Our task is to give effect to this legislation and to the authority which Congress has seen fit to repose in the Communications Commission.

To come to the immediate issue, what has the Commission done that is here challenged and what authority from Congress does it avouch for what it has done?

The Commission had before it at least two applications for the use of the same radio wave length in the Western Michigan area (Muskegon-Grand Rapids)—that of the petitioner and Fetzer's. The problem before the Commission was the procedure appropriate in acting upon these two applications. Congress has authorized the Commission to grant an application without resort to a public hearing, 47 U. S. C. §§ 309(a), 319(a), but a public hearing may be demanded when the Commission denies an application, 47 U. S. C. § 309(a). The Court in effect rules that in the case of multiple applications the Commission can decide only after a public hearing on all of them. This requirement is apparently derived from the assumption that in this case the Commission, having received two conflicting applications, shut off, out of hand and quite arbitrarily, petitioner's right to have its application considered, as of course the Commission is in duty bound to consider it, by granting Fetzer's. But that is not what happened. The Commission is charged with the ascertainment of the public interest. We must assume that an agency which Congress has trusted discharges its trust. On the record before us it must be accepted that the Commission before having taken action carefully tested, according to its established practice, the claims both of Fetzer and of petitioner by the touchstone of public interest. See Attorney General's Committee on Administrative Procedure, Monograph No. 3, The Federal Communications Commission (1940) 8 *et seq.* On the basis of such inquiry, it found that the Fetzer application was clearly in the public interest; it found that the Ashbacker application did not make a sufficient showing

even to stay the Commission's hand in withholding the Fetzer grant long enough to enable Ashbacker to support its application more persuasively. On the contrary, it thought the public interest would be furthered by making Fetzer's service available at the earliest possible date. There is nothing in the Communications Act that restricts the Commission in translating its duty to further the public interest as it did in the particular situation before it. In granting Fetzer's application and setting the denial of the petitioner's down for a hearing after fully canvassing the situation, the Commission brought itself within the explicit provisions of the Communications Act and applied them with that flexibility of procedure which Congress has put into the Commission's own keeping. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138.

But it is suggested that the right to a hearing upon denial of an application is not satisfied by a hearing bound to be barren. In order to appreciate the function of a hearing under the statute in a situation like that before us, however, it is vital to remember that the two applications of petitioner's and Fetzer's are very different from an ordinary litigation between Fetzer and petitioner in a court of law. Each of them was before the Commission as the representative of the public interest, the ascertainment of which is the expert function of the Communications Commission. It bears repeating that the application of both presumably received careful scrutiny by the Commission before action was taken. Administrative practice indicates that where there are conflicting applications, the Commission has granted some without hearing where it thought the public interest best served by that procedure, while setting others for hearing where the public interest so demanded.[1] Fetzer made a clear showing to the agency designated for the purpose by Congress that the public interest would be served by the grant of its application. The same agency found no basis in public interest for Ashbacker's application. Certainly it is wholly conso-

[1]

Fiscal Year	*Total No. of Applications Considered*	*Conflicting Applications*		
		Number	*No. Granted Without Hearing*	*No. Granted After Hearing*
1941	159	49	14	2
1942	142	52	1	2
1943	23	5	0	1
1944	39	14	2	1
1945	114	69	5	8

nant with the scheme of the legislation and the powers given to the Commission that, upon denial of the Ashbacker application after a finding that it would not and Fetzer would serve the public interest, the burden be cast on Ashbacker to show that it would serve the public interest better than would Fetzer. The Commission is authorized by statute to modify a construction permit or any license granted by it.[2] This gives considerable scope for adjusting the prior grant to Fetzer so as to give to the public the benefits of reconciling both the Fetzer and the Ashbacker applications, if the hearing should develop considerations not disclosed by the prior scrutiny of the Commission. Not only that, but the Commission, in its opinion on hearing the Ashbacher complaint, construed its own action in granting the Fetzer application to be conditional, so as to have room for any action which it may find will serve the public interest after the hearing on the Ashbacker application. Such a practice of conditional grant by the Commission ought not to be deemed outside the range of the procedural discretion allowed to it by Congress.[3]

In this case, however, the restrictions of the hearing granted to Ashbacker do make of it a mere formality, for the Commission put upon Ashbacker the burden of establishing that the grant of a license to it would not interfere with the simultaneous operations of the proposed Fetzer station. But since the Commission had apparently already concluded that the simultaneous operation of the two stations would result in "intolerable interference," its order for a hearing seems to foreclose the opportunity that should still be open to Ashbacker. It is entitled to show the superiority of its claim over that of Fetzer, even though the Commission, on the basis of its administrative inquiry, was entitled to grant Fetzer the license in the qualified way in which the statute authorized, and the Commission made, the grant. In my view, therefore, the proper disposition of the case is to return it to the

[2] Sec. 312(b): "Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with . . .." *Cf.* 47 Code Fed. Reg. § 1.402.

[3] *Cf.* Berks Broadcasting Company (WEEU), Reading, Pennsylvania, 8 F. C. C. 427; The Evening News Association (WWJ), Detroit, Michigan, 8 F. C. C. 552; Merced Broadcasting Company (KYOS), Merced, California, 9 F. C. C. 118, 120.

Commission with direction that it modify its order so as to assure an appropriate hearing of the Ashbacker application. It may be wise policy to require that the Communications Commission should give a public hearing for all multiple applications before granting any. But to my reading of the Communications Act, Congress has not expressed this policy.

Mr. Justice RUTLEDGE joins in this opinion.